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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION

Initial reports of States parties due in 1988

Addendum

SENEGAL */

[30 October 1989]

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*/ The present document replaces the initial report submitted by the Government of Senegal on 21 October 1988 and reproduced in document CAT/C/5/Add.8.

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*/ These documents are available for consultation in French, as they were received from the Government of Senegal, in the files of the United Nations Centre for Human Rights.

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Part I

GENERAL INFORMATION - GENERAL LEGAL FRAMEWORK FOR CRIMINAL CASES

I. CONSTITUTIONAL FRAMEWORK

A. The human being

1. When it acceded to international sovereignty, the Republic of Senegal opted for a society which would be "secular, democratic and social, ensure equality before the law for all citizens without distinction as to origin, race, sex or religion and respect every faith", as stated in article 1 of its Constitution.

2. Senegal has always claimed to be a State subject to the rule of law where the promotion and protection of human rights are fully guaranteed. Accordingly, the preamble to the Constitution states that the people of Senegal "proclaims its attachment to the fundamental rights set forth in the Declaration of the Rights of Man and the Citizen of 1789 and the Universal Declaration of 10 December 1948", as well as "unassailable respect for and guarantees of political, trade union, philosophical and religious freedoms, the rights and liberties of the human being and the family and economic and social rights". The body of the Constitution contains an entire part II entitled "Public freedoms and the human being" and dealing with these rights and freedoms.

3. Under article 6, paragraph 2, of the Constitution, the rights and freedoms of the human being are inviolable and inalienable and form "the basis of every human community and of peace and justice in the world". This shows in what high regard the human being is held in Senegal. Article 6, paragraph 1, provides, moreover, that the human being is "sacred" and that "It shall be the duty of the State to respect and protect the human being".

4. Because the human being is sacred, article 6, paragraph 3, states that "Everyone shall have the right to life and to physical integrity under the conditions laid down by law". No one may or should therefore be arbitrarily deprived of his life. Although article 7 of the Penal Code provides that "Afflictive and infamous punishments are death, hard labour for life ...", the fact is that Senegal, which has always been anxious to ensure respect for the inherent right to life of every human being, has placed severe restrictions on the imposition and enforcement of the death penalty. In so doing, it is giving effect to the relevant provisions of article 6 of the International Covenant on Civil and Political Rights, to which it is a party. In Senegal, the death penalty may thus be imposed only in very few cases and for particularly serious crimes, primarily crimes involving bloodshed, such as murders, killings involving barbarous acts or torture, theft involving acts of violence resulting in death and unlawful arrests accompanied by physical torture. Under article 6, paragraph 4, of the Constitution, moreover, a person may be sentenced to death only "by virtue of a law in force before the commission of the act in question".

5. The death sentence may be carried out only if the judgement is final, i.e. where the time-limit for lodging an appeal with the Court of Cassation has expired or, if an appeal has been lodged, after the decision dismissing

the appeal has been handed down and, even so, only after a pardon has been denied (art. 684, para. 5, of the Code of Criminal Procedure). In Senegal, all cases involving persons sentenced to death must automatically be submitted to the Head of State, who, under article 41 of the Constitution, has "the right to grant pardon".

6. It may also be noted that, under article 52 of the Penal Code, minors under the age of 13 may not be sentenced to death and that, if a woman who is sentenced to death declares - and if it is proved - that she is pregnant, she will suffer the penalty only after having given birth (art. 16 of the Penal Code). In any event, it is very encouraging that no death sentence has been carried out in Senegal in nearly 20 years and, indeed, it may be said that the penalty has been abrogated de facto.

7. In addition to the right to life, article 6, paragraph 3, of the Constitution proclaims "the right to physical integrity". Many provisions of the Penal Code lay down penalties for violations of this right. For example: (a) Under articles 294 and 295 of the Penal Code, assault and battery resulting in mutilation, amputation or deprivation of the use of a limb are punishable by 5 to 10 years' imprisonment (art. 294, para. 2) and by 10 to 20 years' hard labour where there has been premeditation or felonious intent (art. 295); (b) Under article 304 of the Penal Code, any person guilty of the crime of castration is liable to 10 to 20 years' hard labour.

8. Violations of the human rights and freedoms provided for in the Constitution are usually punished by the law, often severely. Chapter III of the Penal Code thus deals exclusively with crimes and offences against the Constitution, which include violations of the exercise of civil rights (arts. 101 to 105), violations of freedom (arts. 106 to 113) and abuses by the administrative and judicial authorities (art. 118).

9. It will be agreed that a country which respects and protects human beings to the extent that Senegal does cannot allow the practice of torture within its borders. Such barbarism is inconceivable in our country. It is no accident that the few crimes punishable by the death penalty include killings involving barbarous acts of torture and unlawful arrests accompanied by physical torture. In such cases, the law is so severe that accused persons who are found guilty are not granted the benefit of mitigating circumstances because it is considered that there can be no justification for torture, whether it is committed by a public official or by a private individual.

B. The legality of offences and penalties

10. The Latin rule governing the legality of offences and penalties, "nullum crimen nulla poena sine lege", is definitely the most important rule embodied in our criminal law. The rule is also to be found in article 6, paragraph 4, of the Constitution, which provides that "No one may be convicted of an offence except by virtue of a law in force before the commission of the act in question".

11. Article 4 of the Penal Code states the rule in the following terms: No offence or crime may be punished by penalties not provided for by law before it was committed". Under this rule, the judges of criminal courts in Senegal, as in other civilized countries which have adopted this rule, are prohibited

from creating offences arbitrarily or artificially and imposing whatever penalties they wish or interpreting the law broadly. As a result, legislation is the only source of criminal law in our country. It alone may define what is and what is not an offence and determine what penalties are applicable to what it characterizes as a misdemeanour, offence or crime. Furthermore, this could not have been otherwise in Senegal, which is a State subject to the rule of law or, in other words, a State where, according to Merle and Vitu, "the administrative and judicial bodies are bound to abide by the general rules established by law to ensure respect for individual freedoms and the life of the community".

12. With regard to the question of a conflict of laws in terms of time, a further consequence of the principle of legality is that new legislation may not be retroactive, at least when it is more severe than earlier legislation. Article 4 of the Penal Code states both the principle of legality and its corollary, the rule of non-retroactivity. Moreover, since, as indicated above, the principle of legality is embodied in the Constitution, the question arises whether a criminal court might not logically have the power to rescind law which violated that principle, on the grounds of unconstitutionality. The answer is that, in Senegal, there is no systematic monitoring of constitutionality by the courts of law. In the case of regulations, however, an objection on the grounds of unlawfulness may be raised before a criminal court.

C. The right to a defence

13. Article 6, paragraph 4, of the Constitution provides that "The right to a defence shall be absolute at every stage and level of the proceedings". Any person who is being prosecuted in a court of first instance, a court of appeal or the court of cassation has the constitutional right to defend himself against the charges brought against him. He may be assisted by counsel of his own choosing, if he so wishes. It is assumed that, in an impartial criminal trial, both the interests of society, as represented by the Department of Public Prosecutions, and the defence of the rights and freedoms of the individual will be guaranteed.

14. We have seen that, under article 6 of the Constitution, the right to a defence is "absolute". This is all the more true in that the law makes the presence of defence counsel for the accused person compulsory, as, for example, in the Assize Court, which tries the most serious crimes. Under articles 257 and 258 of the Code of Criminal Procedure, if the accused person does not choose his own counsel, the President of the Assize Court, during the interrogation preceding the hearing, appoints one for him ex officio from among the panel of advocates or pupil lawyers. Because the presence at the hearing of defence counsel for the accused, is compulsory, the President must appoint a substitute if the counsel chosen or appointed under the above-mentioned article 257 fails to appear (art. 298 of the Code of Criminal Procedure).

15. The assistance of defence counsel is also compulsory in the correctional court and before the examining magistrate when the accused is "suffering from a disability likely to jeopardize his defence". If the accused does not choose a lawyer to defend him, the President or examining magistrate appoints

counsel ex officio (art. 404, para. 4, and art. 101, para. 4, of the Code of Criminal procedure). Likewise, in cases brought before the examining magistrate with special responsibility for minors, if the minor or his representative fails to choose defence counsel, the magistrate orders defence counsel to be appointed ex officio by the President of the Bar or his deputy (art. 575 of the Code of Criminal Procedure).

16. In cases of flagrante delicto, article 384 of the Code of Criminal Procedure requires a person brought before a court to be notified by the President that he is entitled to claim time to prepare his defence; otherwise, the judgement is null and void. If the accused person avails himself of this possibility, the court has to give him at least three days for the purpose. In every case and in every court, the defence will always be given the last word.

17. In addition to the right to a defence, however, there are what are known as the "rights of the accused", which are guarantees necessary for the defence of any person charged with a criminal offence. A State such as Senegal which claims to be democratic and is based on the rule of law has to respect these rights. The first one derives, as it were, from the fundamental principle of our criminal law, namely, the presumption of innocence, as set forth in article 11 of the Universal Declaration of Human Rights adopted by the United Nations in 1948. An accused person is presumed innocent until full and conclusive evidence of his guilt has been adduced. If the prosecution is unable to produce evidence of the various elements which constitute the offence and thus prove guilt, the accused must be acquitted because there is still doubt as to whether he participates in the criminal act. This is another principle of our criminal law: the accused enjoys the benefit of the doubt (in dubio pro reo).

18. It is not our intention here to give an exhaustive list that might quickly become a tedious account of all the rights of the accused provided for in our Code of Criminal Procedure. We would, however, mention the following:

(a) During the preliminary investigation phase, the examining magistrate notifies the accused of the charges against him and warns him that he is free to say nothing. Mention of such warning is made in the record (art. 101, para. 1, of the Code of Criminal Procedure). The intention of the law was certainly to warn the accused of the danger of making rash statements and to give him an opportunity to speak only in the presence of his lawyer. He should also be notified of his right to choose a counsel from among the panel of advocates or pupil lawyers. Mention of such notification is made in the record (art. 101, para. 3, of the Code of Criminal Procedure).

(b) Once the accused has chosen his counsel, he is entitled to communicate freely with him if he is being held in detention and under no circumstances may a ban on such communication be imposed by the examining magistrate (art. 103 of the Code of Criminal Procedure). In addition, unless he expressly renounces such a procedure, he may be heard or confronted only if said counsel has been summoned by registered letter and has acknowledged receipt of it at least two days before the interrogation or confrontation (art. 105, paras. 1 and 2, of the Code of Criminal Procedure). In the same registered letter, the counsel is informed that, 24 hours before the interrogation or confrontation, the case file will be placed at his disposal

in the judge's chambers or in the office of the clerk of the court (art. 105, para. 3, of the Code of Criminal Procedure). Articles 101 and 105 are so important that the law punishes any violation of their provisions by voiding both the act itself and any subsequent proceedings (art. 164 of the Code of Criminal Procedure).

(c) The same concern to guarantee the rights of the accused may be seen in respect of the serving of warrants or summonses, since the law makes a point of establishing a link between a warrant and the interrogation of the accused. Any person who has been served a summons, a warrant to compel attendance or an arrest warrant must be promptly informed of the reasons for his summons or arrest and be able to defend himself immediately (arts. 110 to 124 of the Code of Criminal Procedure). The committal order also includes this link between the interrogation and the serving of the warrant, even though, in such a case, unlike the others, the interrogation takes place before the warrant is issued. The important point is that article 125 of the Code of Criminal Procedure provides that "The examining magistrate may issue a committal order only after the accused has been questioned". It should also be emphasized in connection with committal orders and, hence, custody, that respect for the rights and freedoms of the individual and, in particular, of the right to freedom of movement has the result that, in Senegal, another fundamental principle of criminal law is that freedom must always be the rule and custody the exception.

19. In addition to the procedural nullity referred to above and the provision of article 164 of the Code of Criminal Procedure punishing violations of articles 101 and 105 of the Code of Criminal Procedure, article 166 of the Code states that "There shall also be nullity in the event of a violation of the substantive provisions of the present chapter, except for those contained in article 164, and, in particular, in the event of the violation of the rights of the accused". This shows how much importance Senegalese law attaches to the rights of the accused. Any violation of these rights is punishable by procedural or substantive nullity.

D. Emergency situations

20. These are crisis situations caused by a serious threat to the institutions of the Republic or by a real and imminent threat to the population or the internal security of the country. To deal with such situations, the Constitution provides for the implementation of emergency measures, which are contained in article 47 on the emergency powers of the Head of State and in article 58 giving the President of the Republic the authority to proclaim a state of emergency or a state of siege.

1. Emergency powers under article 47 of the Constitution

21. Article 47 authorizes the President of the Republic to take measures of a legislative nature in order to deal with a situation in which "... the institutions of the Republic, the independence of the nation, its territorial integrity or the implementation of its international commitments are subject to any grave and imminent threat and the proper functions of the authorities are disrupted". It is clear that what are involved here are circumstances of exceptional seriousness calling for the prompt adoption of correspondingly exceptional measures which may entail restrictions on the rights of the

individual. It is for this reason that, Senegal having opted for the rule of law, its Constitution provides that any measures that the Head of State may be obliged to take in such circumstances are subject to very strict conditions.

22. Such measures must be taken with the sole intent of re-establishing the proper functions of the authorities and ensuring the protection of the nation. In addition, the President of the Republic must first inform the nation in a message both of any imminent threats to the Republic's institutions and of the content of the measures he intends to take to counter those threats. Such measures may not in any event involve any change in the Constitution, which offers a high degree of protection for the rights and freedoms of individuals. Article 47 thus expressly rules out the possibility of any amendment to the Constitution during such a period.

23. In addition, there is the condition that any measures taken by the Head of State must be submitted for approval to the National Assembly, which convenes automatically, if it is not already in session, to ratify them. To this end, any such measures must be referred, within 15 days of the promulgation thereof, to the Assembly; they will lapse if the ratification bill is not tabled before the Assembly within the above-mentioned period or if the Assembly simply refuses to give the ratification requested. The Assembly may amend the measures when the ratification bill is before it.

2. State of emergency and state of siege

24. Under article 58 of the Constitution, "A state of siege and a state of emergency shall be decreed by the President of the Republic". Under Act No. 69-29 of 29 April 1969 governing both the state of emergency and the state of siege, a state of emergency may be proclaimed in respect of all or part of the territory of the Republic, in the event either of imminent danger resulting from serious breaches of the peace (ordre public) or of subversive activities jeopardizing internal security or of incidents which, because of their nature and seriousness, constitute a danger to the State. A state of emergency is undoubtedly a measure that affects certain fundamental human rights, including freedom to come and go. It is for this reason that our courts have consistently held that any measures taken by the administrative authorities must be strictly necessary for the maintenance of public order.

25. Although a state of siege is proclaimed in the same conditions and for the same reasons as a state of emergency, there is a basic difference between the two, namely, that as soon as a state of siege has been declared, the powers relating to maintenance of order and normally vested in civilian authorities are transferred to the military authorities. However, the latter, too, are authorized to take only such measures as are strictly necessary for the maintenance of order.

26. Article 58 provides the same guarantees for the safeguarding of human rights as those decreed under article 47. The National Assembly thus convenes automatically if it is not in session. The intention, as in the case of the emergency powers provided for under article 47, is to place any measures enacted pursuant to article 58 under the control of the representatives of the people. It should also be noted that the decree proclaiming a state of emergency or a state of siege will cease to be valid after 12 days. Its extension can be authorized only by the National Assembly at the request of the President of the Republic.

27. By making the emergency measures provided for under articles 47 and 58 subject to certain very carefully drafted regulations, the Constitution of the Republic of Senegal has made clear its determination to ensure that no exceptional circumstances can justify serious interference with fundamental human rights. In other words, its intent has been to prevent a situation in which, on the pretext of threats - even genuine threats - the State might come to the point, in Mirabeau's words "of stifling every kind of freedom by exaggerating every kind of danger".

E. Treaties and international agreements

28. Under article 79 of the Constitution, "Treaties or agreements duly ratified or approved shall, upon their publication, prevail over the laws, subject to each treaty or agreement being implemented by the other party". This means that, once international treaties have been ratified and published, compliance with them becomes obligatory for all State organs, including the judiciary. In other words, the provisions of the Convention against Torture, which has been duly ratified by Senegal, may be invoked before the courts and administrative authorities in Senegal and may be enforced directly by them, subject only to the reservation laid down in article 79 whereby the Senegalese judge will in each case have to ascertain what solutions are applied by States which are parties to agreements with Senegal. However, this should not pose too many problems in the case of bilateral treaties or in the case of conventions such as the Convention against Torture, which is based on a whole set of universally recognized principles.

29. As to the effects of the Convention on individuals, the principle is still that individuals are not affected by the rules of international law unless the latter have been incorporated into internal law. Accordingly, it is important that States parties should comply with their obligations under articles 2 to 16 of the Convention, which will be covered in part II of the present report.

II. DETERMINATION OF CRIMES AND OFFENCES

A. The criminal investigation department

30. Under article 14 of the Code of Criminal Procedure, the criminal investigation department is responsible for ascertaining that criminal offences have been committed, for collecting evidence of such offences, and for identifying the offenders, provided that a preliminary investigation has not been initiated. Once an investigation has been initiated, the department carries out the orders of the examining magistrates and complies with their requests. This means that, once a case has come before the examining magistrate, the department has no further direct involvement in the investigation and can act only on the orders of the court through what are known as "judicial representations". Under articles 12 and 13 of the Code of Criminal Procedure, the criminal investigation department acts on the instructions of the Government Attorney at the Court of Appeal and under the supervision of the Indictments Division.

31. The staff of the criminal investigation department is divided into three categories: criminal investigation officers; criminal investigation agents; and officials and agents entrusted with certain criminal investigation functions.

1. Criminal investigation officers

32. Article 15 of the Code of Criminal Procedure gives a list of persons who hold the rank of criminal investigation officers. These persons include gendarmerie officers with the rank of brigade commanders, police inspectors, police officers, etc. Only criminal investigation officers hold the full criminal investigation powers defined in the above-mentioned article 14. They receive complaints and accusations and conduct preliminary investigations. The Code of Criminal Procedure specifically gives them the right to investigate flagrante delicto cases. They may directly request the assistance of the security forces in carrying out their duties. They are also entitled to take statements from victims wishing to claim indemnification. They perform their functions under the authority of the State Prosecutor and article 18 of the Code of Criminal Procedure (Act No. 85-25 of 25 February 1985) requires them to inform the latter - or his deputy in the departmental court - without delay of any crimes, offences or misdemeanours which come to their attention. The operations of criminal investigation officers are recorded in reports and, on conclusion of such operations, the originals of these reports, together with any statements or documents relating thereto, must be transmitted to the Department of Public Prosecutions. Such reports must state that they were prepared by a criminal investigation officer.

33. As indicated in article 13 of the Code of Criminal Procedure, criminal investigation officers also act under the instructions of the Government Attorney at the Court of Appeal and under the supervision of the Indictments Division, which may establish their disciplinary liability under the conditions laid down in articles 213 to 217 of the Code of Criminal Procedure. These articles give the Indictments Division the necessary powers to prevent abuses which may be committed by criminal investigation officers in the exercise of their functions. A case may be referred to the Indictments Division either by the Government Attorney or by its own President. The

Indictments Division may even take up a case itself after consideration of any brief that may be submitted to it (art. 214 of the Code). The disciplinary procedure in such cases involves an inquiry by one of the members of the Division, the handing over to the officer concerned of his personal file (which is kept in the Office of the Prosecutor of the Court of Appeal), hearings held in camera, but with arguments for the defence (the officer being entitled to the assistance of a lawyer) and, finally penalties. These penalties range from comments by the court to a temporary or permanent ban on the exercise by the person concerned of his functions as criminal investigation officer and representative of the examining magistrate anywhere in the national territory. These penalties may be combined with any disciplinary measures taken against the officer concerned by his superiors in the department (art. 21, para. 1, of the Code of Criminal Procedure).

34. In addition, if the Indictments Division considers that the officer has committed a criminal offence, it will order his case to be transmitted to the Government Attorney with a view to the possible establishment of criminal liability. The fact is that members of the criminal investigation department do sometimes commit violations of the criminal law in the course of their duties. These violations may be offences such as unlawful entry, tampering with correspondence, bodily injury and arbitrary arrests and detentions. However, they may also be crimes, as in the case of illegal arrests accompanied by physical torture, which carry the death penalty under article 337, last paragraph, of the Criminal Code.

35. When a criminal investigation officer is accused of having committed an offence in the exercise of his functions, the Government Attorney at the Court of Appeal will, as provided for in article 661 of the Code of Criminal Procedure, have him summoned before the first division of the Court, which will pronounce sentence with no right of appeal. When a criminal investigation officer is accused of a crime, only the Court of Appeal composed of at least five judges is competent to rule on the crime once the case has been referred to it by the Indictments Division (art. 663 of the Code of Criminall Procedure). The functions of the examining magistrate to investigate the case are assigned under article 662 to the First President of the Court of Appeal or to the judge at the Court specially appointed by him. The Government Attorney will then exercise the functions of officer of the Department of Public Prosecutions (art. 662 of the Code of Criminal Procedure).

2. Criminal investigation agents

36. Under article 20 of the Code of Criminal Procedure, criminal investigation agents are responsible "for assisting criminal investigation officers in the exercise of their functions; for reporting to their superiors any crimes, offences or misdemeanours which come to their attention; for recording, in accordance with the orders of their superiors, any criminal offences committed; and for collecting evidence with a view to identifying the offenders". Although criminal investigation agents are authorized to write reports on the offences they have recorded and to carry out any preliminary investigations, they do not have the authority to issue custody orders.

3. Officials and agents entrusted with certain criminal investigation functions

37. This category includes Government officials to whom certain powers of investigation are attributed by specific provisions which define both the extent of these powers and the circumstances under which they may be exercised. While they may investigate the elements constituting the offence, they are not empowered to enter homes, workplaces or buildings except in the presence of a criminal investigation officer, who cannot refuse to accompany them and who signs the report on the operation carried out. If necessary, they may request the assistance of the police forces of jurisdiction in which they operate. Their reports must always be submitted within eight days, either to the regional court within whose jurisdiction the offence was committed or to the representative of the prosecutor in the departmental court.

B. Custody

38. Detention in custody is the right which criminal investigation officers are given by law to hold a particular person at their disposal for the purposes of an investigation. Detention in custody may be ordered in the course of a preliminary investigation, as well as in the course of an investigation, in a flagrante delicto case. Under article 55 of the Code of Criminal Procedure, a custody order may be issued in the course of an investigation in a flagrante delicto case against four categories of persons: persons who have been banned from leaving the area (art. 53, para. 1); persons whose identity needs to be established; persons who may be able to give information on the facts of the case; and persons against whom there is serious and concordant evidence to justify indictment.

39. For persons in the first three categories, the duration of detention in custody may not exceed 24 hours, whereas, for persons in the fourth category, the duration may be longer (up to 48 hours) and may be extended by a further period of 48 hours, by written order of the State Prosecutor, his deputy or the examining magistrate (art. 55, para. 7).

40. During a preliminary investigation, however, the criminal investigation officer may only hold in custody a person in respect of whom evidence of guilt already exists. In such a case, the period of custody may not exceed 48 hours, except where an extension for a further period of 48 hours is ordered by the Prosecutor's Office concerned, and, when this period has expired, the person so detained must be immediately brought before the State Prosecutor (art. 69, paras. 1 and 2, of the Code of Criminal Procedure). The period of custody provided for in connection with investigations of flagrante delicto cases and preliminary investigations is doubled in the case of crimes or offences against the security of the State and in the case of all crimes and offences committed during a state of siege or state of emergency and during periods when article 47 of the Constitution is in force (art. 55, para. 8, and art. 69, para. 3, of the Code of Criminal Procedure).

41. Custody is undoubtedly a measure which may involve serious interference with individual freedoms. Accordingly, as a result of the amendments introduced in 1985 (Act No. 85-25 of 25 February 1985), the Senegalese legislator has hedged it about with a number of formalities designed to

protect the rights of individuals against whom a custody order is issued. These formalities, which are required under articles 55 to 58 of the Code of Criminal Procedure in investigations of flagrante delicto cases, must also be observed in preliminary investigations (art. 69, last paragraph, added by the above-mentioned Act No. 85-25 of 25 February 1985).

42. It should be noted first of all that detention in custody may be ordered only by a criminal investigation officer, never by a criminal investigation agent, even though the latter, like the gendarmes, is authorized under article 20 of the Code of Criminal Procedure to conduct a preliminary investigation. Article 20 expressly states, moreover, that gendarmes are not authorized to take decisions regarding custody orders. Secondly, whenever criminal investigation officers decide to issue a custody order, they are required to inform the State Prosecutor or his deputy immediately (art. 55, para. 3, of the Code of Criminal Procedure). Similarly, they must tell the person in question the grounds for their decision to issue the order. They are also required to inform him of the grounds for any extension of the order (art. 55, para. 9, of the Code of Criminal Procedure).

43. Thirdly, so that checks may be made on the circumstances in which custody took place, the Code of Criminal Procedure lays down a number of requirements. Thus, under article 57, paragraph 2, the record of the examination of every person held in custody must indicate the day and the time from which he is held, the reasons therefor; the duration of the questioning, the duration of rest periods and the day and time on which he is either released or brought before the competent magistrate. Under the same article 57, paragraph 2, such particulars must be especially initialled by the persons concerned; in the event of a refusal, the record must so indicate, failing which the record is null and void. The same particulars must be included in the custody register which, under article 55, paragraph 6, of the Code of Criminal Procedure must be kept in every place where a custody measure is enforced. Where gendarmerie squads are concerned, such particulars must be entered in the log books which the gendarmes are required to keep (art. 58 of the Code of Criminal Procedure). The custody register has to be stamped and initialled by the prosecutor's office.

44. Lastly, article 56 of the Code of Criminal Procedure (Act No. 85-25 of 25 February 1985) provides for medical examinations of persons held in custody. During custody, the State Prosecutor or his deputy may, if he finds it necessary, order that such an examination should be carried out by a physician designated by him. The important point here is that the person in custody, his family, his lawyer or indeed any other person are entitled to ask the State Prosecutor for such a medical examination if the latter has not taken steps to have one carried out. In such a case, the State Prosecutor is obliged to order a medical examination (art. 56, para. 2). The criminal investigation officer must, moreover, always advise the person in custody of his right to such an examination and must include an entry to this effect in the record of the examination, failing which the record is null and void.

1. Supervision of custody

45. Under article 55, paragraph 5, of the Code of Criminal Procedure, a custody order is enforced under the supervision of the State Prosecutor or his deputy. Thus, as indicated above, the custody register kept wherever such an

order is applied has to be stamped and initialled by the prosecutor's office and must be submitted on request to the judges responsible for the supervision of such orders. The entries that must be made in this register and in the gendarmerie log books enable the State Prosecutor or his deputies to ensure, preferably through spot checks, that custody has taken place under the conditions laid down by law.

46. It should be noted that all these entries concerning the reasons for custody, the duration of the questioning, etc., as well as the criminal investigation officer's obligation to advise the person in custody of his right to a medical examination, are compulsory, failing which the record of the examination will be null and void. The courts concerned thus have a means of invalidating any proceedings in which the rights of persons in custody have not been respected. It is also to be noted that, since the criminal investigation department is under the authority of the Government Attorney at the Court of Appeal and under the supervision of the Indictments Division, article 59, paragraph 2, of the Code of Criminal Procedure authorizes the State Prosecutor or his deputy to inform the prosecutor's office in any cases where it is ascertained that there have been abuses in the enforcement of a custody order. This office will in its turn notify the Indictments Division, which may, by virtue of its powers under articles 213, 216 and 217 of the Code of Criminal Procedure, temporarily or permanently divest the person who commits such abuse of his status as a criminal investigation officer or may refer the case to the Government Attorney so that proceedings can be brought if it appears that a criminal offence has been committed (art. 59, para. 3).

III. PROSECUTION OF CRIMES AND OFFENCES

47. Under our criminal law, the prosecution of cases in the criminal courts is basically the responsibility of the Department of Public Prosecutions, which is the main party in every criminal trial, even in cases where the proceedings have been instituted by a civil claimant. Under article 24 of the Code of Criminal Procedure, the Department of Public Prosecutions is represented in every criminal court. Its representative is present at all hearings; all court orders are pronounced in his presence; and he is responsible for the enforcement of sentences. In other words, no criminal court can properly investigate a case or pronounce sentence unless one of the members of the Department of Public Prosecutions is present and has been heard; and his presence must be expressly recorded when sentence is passed.

A. Representation of the Department of Public Prosecutions in court

48. The Department of Public Prosecutions is represented in Senegal's 10 regional courts, as well as in its departmental courts.

49. In the regional courts, the prosecutor is represented by a State Prosecutor assisted by one or several deputies. In a court as important as the Court of Dakar, there will be the chief prosecutor, an assistant prosecutor, a chief deputy prosecutor and deputy prosecutors.

50. In the departmental courts, the representative is a Deputy State Prosecutor. In the latter's absence, the functions of the Department of Public Prosecutions are exercised by the president of the departmental court under the direct supervision of the State Prosecutor (art. 24, para. 2, of the Code of Criminal Procedure).

51. Some representatives of the Department of Public Prosecutions in the regional courts may also be appointed to the juvenile courts. They represent the Department of Public Prosecutions in regional courts or departmental courts in correctional cases. The State Prosecutor is entitled to give guidance and encouragement to, and to supervise, his deputies.

B. Representation of the Department of Public Prosecutions in the Court of Appeal

52. In the Court of Appeal and its subsidiary bodies, such as the court of correctional appeals and the indictments division, these representatives are the Government Attorney, Assistant Public Prosecutors and Deputy Public Prosecutors. One judge in the Department of Public Prosecutions has special responsibility for cases involving minors and sits in a special division of the Court of Appeal.

53. Where the Assize Court is concerned, the Department of Public Prosecutions is represented by the Government Attorney, Assistant Public Prosecutors and Deputy Public Prosecutors when the Assize Court is sitting in Dakar. In principle, these same judges also represent the Department of Public Prosecutions in other Assize Courts in the same area of jurisdiction. However, where the latter are concerned, the Government Attorney may, if he considers it necessary, have himself represented by the State Prosecutor or his deputies.

54. The Government Attorney is responsible for monitoring the enforcement of the criminal law throughout the area of jurisdiction of the Court of Appeal. To this end, State Prosecutors are required to send him monthly reports, known as "Monthly notices", on cases within their jurisdiction. The Government Attorney is entitled to request the assistance of the security forces in the exercise of his duties. Under the hierarchical system on which the organization of the Department of Public Prosecutions is based, the Government Attorney has authority over all representatives of the Department of Public Prosecutions within the area of jurisdiction of the Court of Appeal. He may report to these judges any criminal offences that come to his attention, may instruct them to initiate proceedings or to have proceedings initiated and may refer to the competent court any written instructions he deems appropriate (art. 29, para. 2, of the Code of Criminal Procedure, which refers to art. 28). All such requests must be complied with on penalty of disciplinary measures in the event of refusal, since all representatives of the Department of Public Prosecutions are required to obey the instructions received from their superiors. Lastly, all officers and agents of the criminal investigation department are under the supervision of the Government Attorney at the Court of Appeal, who is authorized to instruct them to collect any evidence necessary for the proper administration of justice.

C. Ministry of Justice

55. All members of the Department of Public Prosecutions have the same hierarchical superior, the Minister of Justice, who is not part of the Department of Public Prosecutions but exercises disciplinary authority over all his subordinates. He has direct power over the Government Attorney at the Court of Appeal and may, under article 28 of the Code of Criminal Procedure, report to him any criminal offences that come to his notice, instruct him to initiate proceedings or have proceedings initiated and refer to the competent court any written instructions he may deem appropriate.

56. The Government Attorney at the Court of Appeal is required, as part of his duties to his superiors, to keep the Minister of Justice informed of cases within his jurisdiction, to seek instructions from him and report to him. However, although the Minister of Justice has disciplinary authority over the judges of the Department of Public Prosecutions, no disciplinary action may be decided on until the Department's Disciplinary Committee has met and given a ruling on the matter. The accused judge is entitled to plead his cause fully before this Committee and may even avail himself of the assistance of a lawyer. In principle, however, the Committee's ruling is not binding on the Minister.

IV. INVESTIGATION OF CRIMES AND OFFENCES

A. Ordinary offences

1. The examining magistrate attached to the courts

57. Under article 39, paragraph 1, of the Code of Criminal Procedure, the duty of the examining magistrate is to "conduct inquiries". He is the main authority for the investigation of ordinary criminal cases. Every regional court has at least one examining magistrate appointed by decision of the Minister of Justice (art. 40 of the Code of Criminal Procedure).

58. In some departmental courts, such as those located at the seat of regional courts, there is also an examining magistrate, but, when the departmental court has only one judge, he will act as examining magistrate in addition to exercising his functions as president of the court (art. 41 of the Code of Criminal Procedure). Article 41 expressly provides that, in such a case, the judge may try the cases he has investigated. This is a derogation from the principle embodied in article 39, paragraph 2, of the Code, which provides that: "He (the examining magistrate) may not, on penalty of nullity, take part in the trial of criminal cases which he has heard in his capacity as examining magistrate."

59. Even though he is appointed by decision of the Minister of Justice, the examining magistrate is still a judge: as such, he may not be removed from office and, in accordance with the provisions of article 80 of the Constitution of the Republic of Senegal, is subject, in the exercise of his functions, only to the authority of the law. In other words, he is independent not only of the Government, but also of the jurisdiction of the courts and of any other authorities involved in the proceedings of a criminal trial (the Department of Public Prosecutions and the trial judge). He has full powers to conduct his investigation and is entirely free to weigh up the appropriateness of the measures requested by the accused or his counsel, by the Department of Public Prosecutions or by the civil claimant. He is likewise entirely free, except in the few cases in which the law provides otherwise, to decide whether the accused should be placed in pre-trial detenion or to order that he should be released on bail.

2. The Indictments Division in the Court of Appeal

60. The Indictments Division is a special section of the Court of Appeal (art. 185, para. 1, of the Code of Criminal Procedure). It is composed of a president and two advisers. Because of the broad powers vested in him by the Code of Criminal Procedure, the President of the Indictments Division, may in principle not perform any other functions. Only exceptionally will he preside over another court and, for this purpose, an order of the Minister of Justice is required. The territorial jurisdiction of the Indictments Division covers the entire jurisdiction of the Court of Appeal or, in other words, the entire territory of the Republic. Its material jurisdiction is extremely broad.

61. With regard to extradition, the judicial phase of the proceedings takes place primarily before the Indictments Division, which, on conclusion of its consideration of the case, must give a legal opinion on the request for extradition. If the opinion is unfavourable, the Government is bound by it

and cannot grant extradition. If the opinion is favourable, however, the Government retains its right to review the matter and may grant or refuse extradition (see Act No. 71-77 of 28 December 1971 on extradition, arts. 14 to 20).

62. The Indictments Division also acts in matters relating to the recovery of civil rights. It rules in such cases, once the Government Attorney and the plaintiff or his counsel have been heard or duly summoned (art. 751 of the Code of Criminal Procedure). As stated earlier, the Indictments Division has disciplinary powers in respect of all criminal investigation officers.

63. In addition to these disciplinary powers, the Indictments Division has three main judicial functions. First, it acts as a court of appeal for rulings handed down by the examining magistrate in matters relating to crimes, offences and misdemeanours. As a higher authority than the examining magistrate, it then proceeds to carry out a compulsory second-stage examination of all investigations of criminal cases before the accused are brought before the Assize Court.

64. Lastly, it exercises general supervision over all investigations: in this sense, it may be said to have full jurisdiction, which it exercises:

(a) By means of revision, which enables it to fill any gaps in the proceedings submitted to it, to rectify any omissions of the examining magistrate, to rectify any imbalances in the descriptions of the facts of the case and to charge persons brought before it (art. 195 of the Code of Criminal Procedure); or

(b) By means of evocation, which enables it to take full charge of a case which it had dealt with only in part, for instance, following an appeal on a particular procedural point. Through evocation, the Indictments Division relieves the examining magistrate of his responsibility for the case and itself takes over the conduct and completion of the investigation. This is what happens when the court, in considering whether the proceedings before it have been conducted properly, finds grounds for nullity and declares the act in question null and void (art. 199 of the Code of Criminal Procedure) or when, in matters other than pre-trial detention, it sets aside a ruling by an examining magistrate (art. 200, para. 2, of the Code of Criminal Procedure).

B. Political offences

1. State Security Court

65. The State Security Court of Senegal was established by Act No. 73-47 of 4 December 1973 to replace the Special Tribunal set up by Act No. 61-57 of 21 September 1961. Its jurisdiction extends over the entire territory of the Republic and it has competence to judge: the crimes and offences against the security of the State referred to in the Penal Code; other political crimes and offences, such as unauthorized gatherings on the public highway or in public places, crimes and offences against the Constitution, etc.; and ordinary crimes and offences relating to the categories mentioned above (art. 1 of the Act).

66. The State Security Court is composed of a president, who is a judge, two assessors appointed by decree and chosen from among citizens at least 30 years of age holding political and civil rights and a Government commissioner who may be chosen from outside the judiciary and who conducts proceedings with the assistance of deputies and a clerk of the court (art. 3 of the Act). Whatever the offence involved, the procedure regarding debates and judgements before the State Security Court is that set forth in the Code of Criminal Procedure for the correctional court (art. 8, para. 1, of the Act). Minors 13 years of age or younger may not be tried before the State Security Court (art. 2 of the Act). Minors from 13 to 18 years of age involved in the same case as one or more adults must be tried separately, but immediately following the trial of the adults, during the same hearing (art. 8, para. 2, of the Act).

67. The investigation of cases submitted to the State Security Court is conducted not by a commission of inquiry, but by one or more judges who are appointed to perform the examining magistrate's functions (art. 3, para. 2, of Act No. 73-47 of 4 December 1973 establishing the State Security Court).

68. Article 7 of the Act sets forth the principle that the investigatory procedure of the State Security Court and the regulations relating thereto are governed by the provisions of the Code of Criminal Procedure on inquiries, but subject to the following conditions:

(a) Exceptions on the grounds of lack of jurisdiction cannot be raised by the accused before the examining magistrate;

(b) Appeals against pre-trial detention warrants are brought before the State Security Court, which is seized without delay by the Government commissioner. It must rule according to the same procedure as the Indictments Division when considering appeals against warrants by an examining magistrate;

(c) Other appeals against decisions by an examining magistrate are brought before the Indictments Division. To this end, the file is transmitted to the Government Attorney by the Government commissioner with his conclusions. The Government Attorney seizes the Indictments Division to rule on the Government commissioner's conclusions. The Indictments Division must rule within 10 days of receiving the case.

69. The seriousness of the offences tried by the State Security Court and the idea that a trial of this kind is a genuine affair of State in the strict sense of the term explains why the powers of the Government commissioner might appear somewhat excessive. Although the jurisdiction of the State Security Court is optional, since it is exercised concurrently with that of the ordinary courts, the ordinary courts cannot try cases involving the offences covered by Act No. 73-47 of 4 December 1973 unless the Government commissioner so agrees. Article 11 of the Act says as much in providing that, "The courts which normally have jurisdiction shall continue to hear the case when the Government commissioner has not taken it over."

70. Furthermore, even supposing that such offences have been properly brought before these courts, so long as debates on the merits have not begun in the court trying the case, the Government commissioner may request those courts to waive their responsibility for the offences which are, in his view, covered by

Act No. 73-47 of 4 December 1973. To this end, he submits a written request to the competent division of the Department of Public Prosecutions, which transmits it without delay to the judge trying the case. The judge is bound to defer to the request and transmit the file without delay to the Government commissioner. Such a removal of a case from a judge is not subject to appeal.

71. Article 139, paragraph 1, of the Code of Criminal Procedure requires the examining magistrate, on application in writing by the Department of Public Prosecutions (State Prosecutor or Government commissioner), to issue a committal order against any person charged with one of the crimes or offences referred to in articles 56 to 100 (crimes and offences against the security of the State, unauthorized gatherings, meetings and assemblies on the public highway or in a public place) and in article 255 (spreading of rumours) of the Penal Code. The examining magistrate has to declare inadmissible any request for release pending trial if the Department of Public Prosecutions objects in writing (art. 139, para. 2, of the Code of Criminal Procedure).

V. TRIAL OF CRIMES AND OFFENCES

A. Ordinary courts

72. Ordinary courts are competent in principle to try all criminal offences and all untried prisoners and accused persons unless a special law has been enacted explicitly removing such persons from their jurisdiction. They are divided into three categories based on a threefold classification of offences: the police court tries misdemeanours; the correctional court hears offences; and the assize court tries crimes. The Correctional Division of the Court of Appeal tries appeals involving offences, where as appeals against judgements concerning misdemeanours handed down by the departmental courts are brought before the regional court.

1. Police court

73. This court tries misdemeanours (art. 509, para. 1, of the Code of Criminal Procedure). In Senegalese criminal law, misdemeanours are offences for which the law prescribes a penalty of imprisonment for one month or more and a fine of no more than 20,000 CFA francs or one of these two penalties only, as well as offences for which the law explicitly gives the police court jurisdiction whatever the penalty incurred (art. 509, paras. 2 and 3, of the Code of Criminal Procedure). The police court is composed of the president of the departmental court and a clerk of the court (art. 511 of the Code of Criminal Procedure).

2. Correctional court

74. The correctional court is competent to try correctional offences. In Senegal, both regional and departmental courts are competent to try correctional offences. However, the departmental courts have only functional jurisdiction and thus hear only cases involving offences for which the law has specially given them jurisdiction (art. 369, para. 1, of the Code of Criminal Procedure). Jurisdiction automatically belongs to the regional courts, which try all offences other than those within the jurisdiction of the departmental courts (art. 369, para. 2). The correctional courts are composed of a single judge. At the regional court level, the judge may be either the president of the court or one of the judges appointed by the president. At the departmental court level, the president himself or a judge assigned by him presides over the correctional hearing.

3. Correctional Division of the Court of Appeal

75. According to article 483 of the Code of Criminal Procedure, "Decisions handed down by correctional courts may be challenged by appeal." When offences are involved, appeals are brought before the Correctional Division of the Court of Appeal. At present, the Court of Appeal consists of two Correctional Divisions composed of one divisional president and two legal advisers. The first president of the Court of Appeal may preside over either of them. Appeals against judgements concerning misdemeanours handed down by the regional courts are also heard by the Correctional Division (art. 535, para. 1, of the Code of Criminal Procedure). However, the regional courts are competent to rule on appeal against judgements concerning misdemeanours handed down by the departmental courts (art. 535, para. 1, of the Code of Criminal Procedure).

4. Assize Court

76. There is a special branch of the Court of Appeal for trying crimes. This is the Assize Court, whose composition is completely different from that of the other ordinary criminal courts. First of all, it is not a permanent court. It holds sessions which must take place once every four months. Secondly, it brings together both professional judges and ordinary citizens called on to administer justice on an occasional basis. These ordinary citizens, who are called jurors are four in number, while there are three judges, one president and two assessors. The jurors are full partners of the three judges. They deliberate on all de facto and de jure problems raised by the consideration of the case being tried.

5. Supreme Court

77. Appeals against decisions handed down in last instance by the Correctional Division of the Court of Appeal, against judgements by the regional courts ruling on appeals against judgements concerning misdemeanours handed down by the departmental courts or against decisions by the Assize Court are heard by the first section of the Supreme Court. This is not a third level of jurisdiction. The Supreme Court is simply responsible for considering the legal basis for the decisions submitted to it and quashing those handed down in violation of the law.

B. Special Courts

78. These courts try only offences and offenders for which a law has explicitly declared them to be competent. In Senegal, these courts include juvenile courts and other special courts such as the High Court and the State Security Court.

1. Courts to try juvenile offenders

(a) Juvenile Court

79. The special nature of the Juvenile Court derives from the provisions of article 566 of the Code of Criminal Procedure stating that: "Minors under the age of 18 accused of an offence characterized as a crime or serious offence are not brought before the ordinary criminal courts and may be referred only to the juvenile courts". A juvenile court is established within each regional court. It is presided by a judge appointed especially by order of the president of the regional court to try minors. It will be noted that, at the level of each regional court, the president must also issue an order appointing an examining magistrate who is especially responsible for conducting investigations into cases involving minors.

80. In the juvenile court, the sentencing of a minor over the age of 13 must be an exception. Such a sentence may take place only where "the circumstances of the case and the personality of the offender so warrant" (art. 567, para. 2, of the Code of Criminal Procedure) and may at any time be amended. The juvenile court is, rather, expected to order "any measures considered appropriate for the protection, assistance, supervision and education of the offender" (art. 567, para. 1, of the Code of Criminal Procedure). This

presupposes knowledge of the personality of the child or adolescent. Article 577 of the Code of Criminal Procedure therefore gives the president of the juvenile court the possibility of enlisting the advisory assistance of the social worker in the case, the representative of the observation centre that drafted the report placed in the file and any other qualified person.

81. Misdemeanours committed by minors under the age of 18 are not within the jurisdiction of the juvenile court. They must be referred to the departmental courts which rule under ordinary law on cases involving misdemeanours (art. 585, para. 1, of the Code of Criminal Procedure). Appeals against such rulings involving minors under the age of 18 are heard by the juvenile court.

(b) Special division of the Court of Appeal

82. Appeals against judgements handed down by the juvenile court are heard by a special division of the Court of Appeal in charge of juvenile cases. One of the legal advisers chosen to form the indictments division is appointed by the first president of the Court of Appeal as counsellor with special responsibility for the protection of children. He presides over the special division (art. 587 of the Code of Criminal Procedure).

2. Other special courts

(a) High Court of Justice

83. The High Court of Justice, established by article 85 of the Constitution of Senegal, is the court empowered to try the President of the Republic in the event of high treason and the ministers for crimes and offences committed in the exercise of their functions, as well as the ministers' accomplices in the event of any conspiracy against the security of the State (art. 87 of the Constitution). The High Court consists of members elected by the National Assembly from among the deputies at the beginning of each legislature. It is presided by a judge (art. 86). An organic law determines the composition of and the procedure followed in the High Court of Justice, which, in cases of offences within its jurisdiction, is bound by the meaning of crimes and misdemeanours and by the penalties applicable thereto as determined by the criminal laws in force at the time of the commission of the acts. Thus, although the High Court of Justice is a special court, it is not exempt from the principle of the legality of offences and penalties set forth in article 6, paragraph 4, of the Constitution and in article 4 of the Penal Code.

(b) State Security Court

84. See chapter IV, section B (paras. 65 et seq.).

(c) Military system of justice

85. The military system of justice is governed by Act No. 63-21 of 5 February 1963, article 1 of which stipulates that, in peace time, military justice is handed down by specially formed ordinary courts. These courts hear special offences of a military nature and crimes, offences and misdemeanours of all kinds committed by military personnel on duty, as well as in barracks, military establishments and places where soldiers are billeted (art. 6 of the Act).

86. With regard to misdemeanours and offences, the regional court in Dakar is competent to try privates, non-commissioned officers and commissioned officers through the rank of lieutenant-colonel and officers of a corresponding rank, exclusively (art. 2 of the Act). The Court of Appeal is competent to try lieutenant-colonels, colonels, officers of a corresponding rank and general officers (art. 2). Both the regional court and the Court of Appeal rule in first and last instances and may enlist the assistance, with voting rights, of two military advisers appointed by the president of the court from a list drawn up by the military chief of staff. In criminal matters, the Dakar Assize Court is competent whatever the rank of the military staff member. The jury is composed of four members of the military appointed by the president of the court from a list drawn up by the military chief of staff (art. 2 of the Act).

C. Lex fori

87. In Senegalese positive law, the principle pertaining to the geographical application of criminal law is that of territoriality. This means that not only does Senegalese criminal law apply to all offences committed in the territory of the Republic, but also that the Senegalese judge trying a criminal case can apply to it only the criminal law of his own country, i.e. Senegal. This would suggest that legislative competence and judicial competence are identical and the Senegalese judge can therefore not, in principle, apply the law of a foreign State or, in other words, that lex loci delicti and lex fori are indistinguishable.

88. This is only a principle, however, and one to which exceptions have, moreover, been made by the lawmakers, since the Senegalese courts are sometimes required to take account of foreign legislative provisions and even to apply them. Exceptions to the principle of the territoriality of criminal law are contained in articles 664 to 671 constituting part XII of book IV of the Code of Criminal Procedure; this part is entitled "Crimes and offences committed abroad". Among those crimes and offences, a distinction must be drawn between those committed by a Senegalese national and those committed by an alien.

1. Crimes and offences committed abroad by a Senegalese national

89. In the event of a crime, a criminal act committed abroad must be punishable under Senegalese law (art. 664, para. 1, of the Code of Criminal Procedure); moreover, the accused person must not already have been subject to a final judgement abroad and, in the event of conviction, have served out his sentence or been granted prescription or reprieve (art. 667 of the Code of Criminal Procedure).

90. In the event of an offence, in addition to the two conditions referred to above, the act must be punishable under the law of the country in which it was committed. This is what is known as reciprocity of indictment. Once such reciprocity has been established, the Senegalese judge will apply to the defendant the indictments and penalties provided for under Senegalese law and the special procedural rules laid down by that law. If the law of the foreign country contains no reference to the act with which the Senegalese citizen is charged, the latter may not be prosecuted or convicted in Senegal.

91. If the offence has been committed abroad against an individual, an additional requirement is provided for under article 666 of the Code of Criminal Procedure, namely, the need for a complaint by the victim or an official complaint by the foreign authority to be filed with the Senegalese authority. A further condition is also specified: "Prosecution proceedings may be brought only upon application by the Department of Public Prosecutions", the reason being that the victim may have exaggerated his claim or the authorities reporting the offence may not have been impartial. Exercising its power of discretion as to the advisability of prosecuting, the prosecutor may file the complaint without further action.

92. Two categories of offences are subject to special rules on account of their particular nature or the circumstances in which they were committed. They are:

(a) Offences against State security and counterfeiting of the State seal or national currency (art. 664, para. 3). Here, because of the higher interests of the State involved, the law is very stringent: "The offence committed outside the territory of the Republic is punishable in the same manner as the offence committed in the territory". Such offences are accordingly treated exactly as though they had been committed in Senegal.

(b) Offences and misdemeanours relating to rural forestry, fisheries, customs and indirect taxation committed in the territory of a neighbouring State are liable to prosecution and judgement in Senegal provided that that State guarantees reciprocity (art. 670 of the Code of Criminal Procedure).

2. Crimes and offences committed abroad by an alien

93. The Senegalese courts are in principle not competent to try offences committed abroad by an alien who has been granted asylum in Senegal, particularly since, not being a Senegalese national, the offender can always be handed over to the foreign authority requesting his extradition. There are, however, two exceptions to the Senegalese courts' lack of jurisdiction. One is that when the State's security or credit is under threat, the Senegalese judge will take action regardless of the nationality of the guilty party, the place where the act was committed and the legislation of the country in which it was committed. The other is when the crime or offence committed abroad by an alien is prejudicial to the interests of the international community. There arises here the principle of universal jurisdiction provided for in some international conventions to which Senegal is a party and relating, in particular, to drug trafficking, counterfeiting and, finally, the Convention against Torture.

VI. REMEDIES

94. Appeal, appeal to the Court of Cassation and appeal against abuse of authority are necessary procedural remedies for safeguarding individual rights against decisions that may prove prejudicial to citizens.

A. Appeal

95. In Senegalese criminal law, appeal is a normal means of redress and revision enabling a case to be re-examined in depth by a higher court. Appeal is the expression of the rule of two-tier jurisdiction. It may be recalled that, under article 483 of the Code of Criminal Procedure, decisions handed down by correctional courts may be challenged on appeal, which is to the Court of Appeal. According to article 484, the person charged with the offence, the person liable under civil law, the party claiming indemnification as regards his interest under civil law only, the State Prosecutor, public authorities in cases where they institute prosecution proceedings and the Government Attorney at the Court of Appeal have the right of appeal.

96. The time-limit for appeal is 30 days from the date of pronouncement of the defended judgement (art. 485). The time-limit for appeal by the State Prosecutor is 45 days from the date on which the decision was handed down, in the case of decisions by departmental courts (art. 486). The Government Attorney has a three-month period in which to appeal, from the date on which the decision was handed down. He is required to serve notice of his appeal to the persons against whom the appeal is lodged (art. 494). As a general rule, the appeal follows from a declaration made to the office of the clerk of the court which has handed down the decision (art. 490 of the Code of Criminal Procedure). The declaration must be signed by the clerk and by the appellant himself or by a lawyer or by a person holding a special power of attorney. An appellant in custody may appeal by a letter given to the governor of the prison. Appeals against decisions involving misdemeanours handed down by departmental courts are brought before the regional court, as indicated above. Appeals against decisions involving misdemeanours handed down by regional courts are brought before the Court of Appeal.

97. The appeal has suspensive and devolutive power. The suspensive power of the appeal means that the decision may not be executed, not only once the appeal has been lodged, but also during the entire period preceding expiry of the time-limit. The devolutive power of the appeal means that the decision subsists even though there is a stay of execution; it is not annulled by the appeal. The latter will consequently entail referral to the higher court of the points of fact and of law on which the lower court ruled.

98. Appeals may not be lodged against decisions handed down in criminal cases by assize courts. This is quite understandable, since the Assize Court is an offshoot of the Court of Appeal. Convicted persons may appeal against the decision only in order to have the decision annulled, for example, in the case of a breach of the law.

B. Appeal to the Court of Cassation

99. Under article 556 of the Code of Criminal Procedure, "An appeal may be lodged with the Court of Cassation in the cases and in accordance with the procedure provided for in the Supreme Court Organization Act". Unlike other

appeals, an appeal to the Court of Cassation is an extraordinary remedy authorized only in the cases determined by law. It is intended only to obtain a ruling on the contested decision for the purpose of having it annulled.

100. The Supreme Court is competent to decide on the merits of the appeal, but does not rule on the merits of the case itself. It is even prohibited from hearing a case on any grounds whatsoever (art. 65 of the Supreme Court Organization Act). The Supreme Court therefore does not assess the facts of the case or decide on penalties. It even takes for granted the judges' establishment of the merits of the case. Its role consists only in verifying that the law has been properly applied to the facts of the case and that there has been compliance with formal procedures.

101. An examination of the provisions of the Organization Act relating to appeals to the Court of Cassation in criminal matters shows that there are in fact three kinds of appeal:

(a) An ordinary appeal, open to the Department of Public Prosecutions and all parties to the case (art. 72 of the Organization Act);

(b) An appeal in the interests of the law ex officio by the Government Attorney at the Supreme Court (art. 71);

(c) An appeal in the interests of the law by the Government Attorney at the Supreme Court by order of the Minister of Justice (art. 71).

1. Ordinary appeal

102. As stated above, all parties to the case may bring such an appeal against final court decisions against them, whether in adversary proceedings or by default (art. 72 of the Organization Act). In the event of default, the appeal can be brought only against judgements and decisions delivered in correctional or police cases, since the defaulting party may not appeal to the Court of Cassation in criminal cases (art. 72, para. 6, of the Organization Act). The appeal is lodged by means of a declaration to the clerk of the court that handed down the decision (art. 73, para. 1) within six days of the decision against which the appeal is filed.

103. The Department of Public Prosecutions can appeal against all final decisions relating to official acts with the exception of acquittal orders delivered by the Assize Court. Such decisions are open to appeal to the Court of Cassation only on the ground of being in the interests of the law (art. 76, para. 3). It is obviously in the interest of persons charged with or accused of an offence to appeal against any conviction under criminal or civil law, against any decision to refer the case to an assize court, against judgements by the Indictments Division refusing a request for conditional release, etc. Persons with civil liability and civil claimants within the limits of their civil interests may also appeal.

104. Cases in which an appeal may be lodged with the Court of Cassation include infringement of procedural rules prescribed by law, conflicting decisions, breach of the law in considering the merits of the case, etc. Ordinary appeals have suspensive and devolutive power. The execution of the penal decision is stayed for the period prescribed for lodging the appeal and

for conducting the appeal proceedings (art. 64-50 of the Organization Act), with the exception of "commital orders or warrants of arrest which are issued by a correctional court or the Court of Appeal and which remain in effect notwithstanding the appeal" (art. 81 ter, para. 1). Similarly, any person held in custody, acquitted or sentenced to a suspended sentence of imprisonment or payment of a fine must be released immediately, notwithstanding the appeal.

105. The appeal is heard by the first section of the Supreme Court which may hand down a judgement of forfeiture, dismissal of proceedings, inadmissibility or dismissal of the appeal. It may also, however, quash the judgement, either partially or totally. In doing so, it may refer the case to a court other than the one whose decision has just been quashed. It may also quash the judgement without referring the case back to the courts, for instance, if no further judgement is required once the decision has been annulled. This applies when the facts for which the defendant was prosecuted do not in fact constitute a punishable offence.

2. Appeals in the interests of the law

106. Such appeals are provided for in article 71 of the Organization Act, which empowers the "Government Attorney at the Supreme Court to lodge an appeal with the Supreme Court on any matter, ex officio or by order of the Minister of Justice, and with no obligation to comply with any time-limit, but in the interests of the law. In this case, the Supreme Court shall hand down a decision without referring the case back to the courts and its decision will have no effect among the parties".

(a) Appeals to the Supreme Court in the interests of the law by the Government Attorney at the Supreme Court, ex officio

107. When a decision has not been challenged by appeal in the interests of the parties within the legal time-limits, but contains a breach of the law, the Government Attorney at the Supreme Court may on his own initiative, without being bound by any time-limit whatever, bring the case before the first section, which may refuse to admit the appeal, dismiss it or quash the judgement. The appeal has no suspensive power and any decision to quash the judgement will have no effect among the parties.

108. As seen above, the Department of Public Prosecutions may not have acquittal orders quashed by means of an appeal in the interest of the parties. The public prosecutor who has been on the bench at the hearing may have recourse only to appeal in the interests of the law and must comply with the regular time-limit, subject to the requirement that the decision to quash the judgement must not be prejudicial to the accused. Should such an appeal fail to be lodged, the Government Attorney at the Supreme Court still has the power to take action in accordance with the above-mentioned provisions of article 71 of the Organization Act.

(b) Appeal to the Supreme Court by order of the Minister of Justice

109. In this case, the appellant is the Minister of Justice himself, but the appeal is lodged through the Government Attorney at the Supreme Court. This procedure allows appeals to be brought not only against final decisions that

have acquired the authority of res judicata, but also initial decisions that are still subject to an ordinary remedy (appeal or opposition). It also permits the annulment of all unlawful judicial administration acts (drawing by lots of the jury of an Assize Court session, opinion given by the Indictments Division in an extradition case).

C. Appeal to the Supreme Court against abuse of authority

110. The purpose of this remedy is to secure the annulment of an administrative decision. As stipulated in article 83 of the Supreme Court Organization Act, "appeals against abuse of authority are admissible only against an explicit or implicit decision by an administrative authority". The time-limit for appeal is two months from the date of publication of the contested decision, unless notification or formal notice is required, in which case the prescribed period commences on the date of notification or notice. In the case of a complaint submitted to the competent authority, the limitation period commences, in the event of explicit rejection, on the date of such rejection. If the competent authority has failed to respond to the complaint within four months, its failure to respond is considered, under article 83, to be tantamount to implicit rejection and the two-month limitation period commences on expiry of the four-month period.

111. If the laws or regulations in force provide for a special administrative recourse procedure, then the appeal against abuse of authority is admissible only once the said procedure has been exhausted, subject to the same conditions in respect of time-limits as above. When the appellant, in order to establish his rights, is fully entitled to file an ordinary appeal, his appeal against abuse of authority is not admissible.

112. The appeal is not suspensive on any grounds. As an exceptional measure, however, the second section of the Supreme Court competent to rule on the merits of the appeal may, at the express request of the appellant, order a stay of execution of the contested decision if the reasons put forward seem valid and if the execution of the decision is likely to cause the claimant irreparable harm (art. 84).

113. The decision of the Supreme Court may be one of inadmissibility, rejection or annulment of all or part of the contested act. The decision to annul an administrative act is applicable to all (art. 87). If the annulled act had been published in the official gazette, the annulment order must be published therein.

VII. PRISON ADMINISTRATION

114. Under Act No. 72-23 of 19 April 1972 containing the prison administration staff rules, the prison administration is responsible for the maintenance, management and operation of prisons, correctional establishments and prison camps. Its members sit on the committees for assistance to prisoners released on parole.

A. Organization of the department

115. Immediately following Senegal's independence, prisons were placed under the supervision of the Department of Prison Administration and Prison Education, which was incorporated into the Ministry of Justice by Decree No. 62-0209 of 28 December 1962. One year later, the Department was incorporated into the Ministry of the Interior by Decree No. 63-795 of 9 December 1963 and given the name of the Department of Prison Administration, while prison education continued to be part of the Ministry of Justice.

116. Under Decree No. 71-685 of 28 June 1971, the Department of Prison Administration became the Directorate of Prison Administration. It is located within the premises of the Ministry of the Interior and is composed of central and regional departments.

1. Central departments

117. These are broken down into five divisions and two departments. The divisions are:

(a) The Legislation, Statistics and Processing Division, which is responsible for preparing legislative texts and regulations on matters within the jurisdiction of the prison administration; for processing applications for pardons, release on parole, work release, etc.; and for the survey on prison population changes.

(b) The Monitoring and Investigations Division, which is responsible for monitoring the organization and operation of prisons and for investigations into members of the prison administration who may be subject to disciplinary action.

(c) The Finance Division, which is responsible for drawing up and implementing the overall budget and the equipment budget, and for the maintenance and feeding of the prison population in the Dakar area.

(d) The Personnel Division, which is responsible for managing all prison administration employees.

(e) The Equipment Division, which is responsible for stocktaking, buildings management and supplies.

118. The departments are:

(a) The Medical and Welfare Department, which is responsible for medical consultations and the care of staff members and their families, the hospital

care of prisoners in the special ward at A. Le Dantec Hospital and at Cap Manuel Hospital, as well as for monitoring hygiene in prisons and for the medical supervision of prisoners.

(b) The Workshops and Farms Department, which is responsible for supervising the operation of workshops and all livestock, agriculture and market gardening projects undertaken by the prison administration.

2. The regional departments

119. A regional department of the prison administration is established in the main town in each region. The head of this department, who represents the Director of Prison Administration within the region, is responsible for co-ordinating the activities of the governors of prisons in the region. In this capacity, he carries out periodic inspections. It should also be noted that the prison administration is given valuable assistance by social workers and instructors, by agricultural engineers, who train prisoners in crop-growing methods, and by marabouts and chaplains, who offer prisoners spiritual guidance.

B. The prison population

120. According to statistics provided by the Directorate of Prison Administration, there were 3,532 prisoners in Senegal's prisons on 31 December 1988. These 3,532 prisoners included 1,469 untried prisoners (41.59 per cent) and 2,063 convicted prisoners (58.41 per cent). Of the total, 97, or 2.75 per cent of the prison population, were women. Seventy-seven of them were untried prisoners and 20, convicted prisoners. The majority, i.e. 54 prisoners, 44 untried and 10 convicted, were detained in Rufisque prison, which is for women.

121. There were 423 foreign prisoners, i.e. 11.98 per cent of the prison population. Their number rose by 130 in comparison with the first half of 1988. They included 195 untried prisoners, including 6 women, and 228 convicted prisoners, including 5 women. Minors accounted for only 2.18 per cent of the prison population, whose average age is, moreover, fairly young, with a predominance of the 26 to 35 year age group, which has 1,380 prisoners. The geographical distribution of prisoners shows that, as far as prisons located in chief towns of regions are concerned (excluding prison camps), Dakar has by far the largest number of prisoners, with 855 out of a total of 1,409, i.e. 60.68 per cent. It is followed by Thiès and Kaolack, with 126 (8.94 per cent) and 123 (8.73 per cent) prisoners respectively.

122. It should be noted that, even though there were more convicted prisoners than untried prisoners (persons under temporary detention) on 31 December 1988, the figure of 1,469 untried prisoners out of a total of 3,532 is still quite high. The monthly statistics between 31 January 1988 and 31 December 1988 also show that, during some months, there were more untried prisoners than convicted prisoners in Senegal's prisons. There is, however, every likelihood that the number of untried prisoners will gradually decline. Senegalese lawmakers, who have borne in mind the fact that freedom is the rule and detention the exception in Senegal, have included a new article 127 bis in the Code of Criminal Procedure to make a committal order

valid for only six months unless the examining magistrate renews it by means of a substantiated decision of which the prisoner is informed and against which he may appeal. If there is no such decision, the accused is automatically released by the governor of the prison. The implementation of article 127 bis will not only gradually reduce the number of excessively long pre-trial detentions, but will also require examining magistrates to speed up the inquiries entrusted to them so that accused persons might come before the courts as rapidly as possible.

C. Physical conditions of detention

123. The rules relating to conditions of detention are contained in Decree No. 66-1081 of 31 December 1966 on the organization of prisons, by Ministerial Order No. 08683/M/INT/CAB of 29 June 1967 and by articles 685 to 698 of the Code of Criminal Procedure. Prisoners are held in prisons, prison camps or correctional establishments.

124. Accused persons, untried prisoners and prisoners committed for trial are held in a prison. Prison camps are intended mainly for convicted persons sentenced to forced labour or to rigorous imprisonment. They may also be used for persons who have been sentenced to prison and who still have more than one year to serve. Other persons sentenced to ordinary imprisonment are sent to a correctional establishment.

125. The above-mentioned texts and, in particular, Decree No. 66-1081 of 31 December 1966 were designed to make conditions of detention more humane, as the main objective is to foster the reformation of prisoners and prepare them for social rehabilitation. Article 10 of the Decree thus states that, "In every prison, correctional establishment and prison camp, men and women shall be provided with separate quarters so as to prevent any communication between them". According to article 576 of the Code of Criminal Procedure, minors over 13 years of age must be separated from other prisoners when they are placed provisionally in prison. In principle, minors are always detained in prison establishments capable of providing schooling or vocational training.

126. In addition, when premises are used both as a prison and as a correctional establishment, there is segregation, in so far as possible, between: (a) accused persons, untried prisoners and prisoners committed for trial; (b) persons sentenced to ordinary imprisonment with less than one year to serve; (c) persons sentenced to minimum-term imprisonment; (d) persons subject to an order of execution against the person (art. 11).

127. Pregnant women are placed in separate premises for the last two months of their pregnancy and stay there for two months following delivery. A child will stay with its mother until the age of three. Only then will it be entrusted to the family or to an approved charitable institution.

128. Special provisions apply to persons who are provisionally in prison. They are not required to work and are allowed to wear their own clothing. They may write every day without restriction to any person of their choosing and receive letters from any person, unless otherwise decided by the examining magistrate dealing with their case. These privileges are explained by the fact that persons provisionally in prison continue to be presumed innocent.

129. Persons sentenced to imprisonment for ordinary crimes or offences are, however, required to work unless they are exempted from doing so on the grounds of age, disability or state of health (art. 692, para. 1, of the Code of Criminal Procedure and art. 30 of the Decree). The proceeds from their work are divided up as follows: six tenths are for prisoners' wages and the reserve fund they are given on release; and four tenths go to the State (overheads, payment of fines and of claims for compensation) (art. 692, para. 1, of the Code of Criminal Procedure and art. 53 of the Decree).

130. However, since it is necessary, in so far as possible, to ensure the social rehabilitation of prisoners when they are released, article 690, paragraph 2, of the Code of Criminal Procedure provides that convicted prisoners whose sentence is to expire before they reach the age of 28 may, as in the case of minors, be held in prison establishments capable of providing schooling or vocational training. In more general terms, article 92 of Ministerial Order No. 08683/M/INT/CAB, of 29 June 1967 provides that: "In so far as possible, primary education shall be provided for prisoners who do not know how to read, write or count properly and who so request it. It shall be compulsory for prisoners who are minors when there are enough of them". It should also be pointed out that prisoners may be allowed to pursue secondary or university education outside working hours. In this case, they either take correspondence courses or study from books on their own. They are given leave to take examinations.

131. While they are in prison, prisoners are attended by social workers and instructors whose role is to give them moral support and try to find the most suitable means of enabling them to take their place in society when they leave prison (art. 89 of the Ministerial Order). A health service under the supervision of a military doctor provides prisoners with the necessary health care. Their rights are also protected. The fact that they are in prison does not mean that they are not entitled to respect for their dignity and personality. Members of the prison staff are thus prohibited from using violence against prisoners, from insulting them or using rude language in speaking to them and from employing them for their personal service (art. 90 of Decree No. 66-1081 of 31 December 1966).

132. Moreover, prisoners who are serving long sentences, whose conduct has been satisfactory and who have obviously tried to prepare for their return to society are admitted to prisons which have a step-by-step system. In these camps, which are selected on the orders of the Ministry of the Interior, the step-by-step system is established to facilitate the return of convicted prisoners to active life consists of a first stage involving an observation period lasting at least one month. In the last stage, convicted prisoners are treated as "trusties" in order to guarantee a smooth transition between prison and freedom. Trusties may be sent outside the prison on placement. This enables them to be employed outside the prison in work supervised by the prison administration. They may also benefit from the system of work release, which involves out-placement, in the same working conditions as ordinary wage-earners, without supervision, but entails the obligation to return to prison each evening and to spend holidays and rest days there. Both out-placement and work release prepare prisoners for release on parole.

133. In addition to minors and persons in pre-trial detention, another category of prisoners is entitled to special privileges: these are political prisoners (art. 151 of the Decree). In so far as possible, political

prisoners are to be imprisoned in a special establishment and in a special wing so that they will be separated from other categories of prisoners. If physically possible, they are given individual cells. They are not required to work and may wear their own clothing and receive, at their own expense, books of their own choosing, as well as newpapers, magazines and food. They may also write and receive visits every day (arts. 151 to 154 of the Decree).

134. It should be noted that prisons are subject to inspection. Inspections may be carried out by the administrative authorities and, in particular, by officials of the prison administration's regional departments or by inspectors from the Monitoring and Investigations Division, as well as by prefects and State inspectors. The judicial authorities (State Prosecutor, Government Attorney at the Court of Appeal, examining magistrate responsible for minors, President of the Indictments Division) are also authorized to carry out inspections.

135. Each prison has a monitoring commission presided over by the governor and composed, inter alia, of a judge and a doctor. The commission inspects the prison; supervises all aspects of sanitation, food, discipline and work; and monitors the prisoners' state of health, their progress towards rehabilitation, the keeping of the regulation files and the conduct of prison staff. It also receives and considers complaints by prisoners and takes any appropriate measures.

Part II

136. This second part provides specific information relating to the implementation by Senegal of articles 2 to 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in accordance with the sequence of those articles.

Article 2

Paragraph 1

137. There is no specific provision in the Senegalese Penal Code for the punishment of torture, as defined in article 1 of the Convention. This may be the result of the fact that the Senegalese, who are known for their tolerance and their hostility to any form of violence, arbitrary action or injustice, cannot condone torture. It is difficult to conceive of such an abominable practice in our country. As Mr. Kooijmans, the Special Rapporteur to examine questions relevant to torture, said, however, no society is safe from what he described as "the scourge of the second half of the twentieth century". Our legislation therefore contains provisions to prevent acts of torture from being committed in Senegalese territory.

138. Such provisions include the following:

(a) The general provisions of article 106 of the Penal Code, which forbid any public official, officer, servant or member of the Government from committing any arbitrary act or any act in violation of the freedom of the individual or the civil rights of one or more citizens, or of the Constitution, prescribe a penalty of loss of civil rights for such acts;

(b) The extremely detailed rules which govern police custody and were discussed in part I. These rules are intended primarily to prevent any ill-treatment or other serious acts of violence from being committed against persons being interrogated simply to obtain a confession from them. Moreover, article 166 of the Penal Code strictly forbids the use of violence by officials or officers of the Government or commanders of the security forces in the exercise of their functions;

(c) Lastly, in order to prevent detention which might lead to abuse of persons who have been arrested or detained, warrants to compel attendance or warrants of arrest must be accompanied by a prompt interrogation, failing which the person concerned must be released. If such a person is held in detention and taken to prison, this is tantamount to arbitrary detention, which is punishable in accordance with article 110 of the Penal Code.

Paragraph 2

139. Senegal has ratified the International Covenant on Civil and Political Rights and has always complied with its provisions and, in particular, article 4, which recognizes that a State is entitled to restrict or suspend the enjoyment of certain rights in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed. Apart from the fact that such restrictions and suspensions are authorized only "to the extent strictly required by the exigencies of the situation", however,

a number of other rights may not be suspended or restricted. Such rights include the right to life and the right not to be subjected to torture. Thus, while our Constitution provides for the possibility that the President of the Republic may take emergency measures under its articles 47 and 58 (see part I, chap. I.D., paras. 20 et seq.) as required by the exigencies of the situation, it makes such emergency measures subject to very strict conditions, as seen above. These include:

(a) The prohibition of any constitutional amendment which might be an opportunity to interfere with the rights and freedoms recognized by the Constitution;

(b) Action by the National Assembly, which is the guarantor of the people's sovereignty, which convenes automatically and to which any measures introduced by the President must be referred within 15 days of the promulgation thereof, failing which the measures will be null and void. Furthermore, the Assembly may amend the measures when the vote is taken on the ratification bill.

140. It is thus clear that Senegal wishes to ensure that, in keeping with the relevant provisions of the International Covenant on Civil and Political Rights, no state of emergency may be a pretext for intolerable violations of fundamental human rights and, in particular, the right not to be subjected to torture.

Paragraph 3

141. In Senegal, an order from a superior officer or a public authority may not be invoked as a justification of illegal acts such as torture. Article 315 of the Penal Code does, of course, provide that: "There is no crime or offence when murder or bodily assault have been prescribed by law and ordered by the lawful authorities". However, apart from the fact that torture cannot be ordered by law in Senegal, there is, according to firmly established precedents, also the fact that article 315 can be invoked as a justification only if the order by the lawful authorities is itself legal. In other words, an illegal order by the lawful authorities cannot be a justification. Consequently, any subordinate officer who carries out an order to commit an act of torture would be criminally responsible and liable to disciplinary measures.

Article 3

142. Senegal has always been a country that welcomes foreigners who wish to reside or settle there and it is a haven of peace for persons who come there seeking asylum because they have various reasons to fear persecution in their country of origin. Its legislation thus contains specific provisions for the protection of the rights of foreigners in general and refugees in particular. Article 7 of Act No. 71-10 of 25 January 1971 concerning conditions for the admission, residence and settlement of foreigners provides that "A foreigner who has been granted permission to reside or settle in Senegal may move freely about the country, subject to the requirements of law and order. He is free to choose his place of residence".

143. Foreigners enjoy the same rights as nationals with regard to public education and social welfare. Labour and social security legislation does not discriminate between Senegalese and foreigners. The treatment of persons who have been granted refugee status by Act. No. 68-27 of 24 July 1968 concerning the status of refugees (amended by Act. No. 75-109 of 20 December 1975) is no less favourable.

144. However, both foreigners and refugees may be expelled. Senegalese legislation has nevertheless made such a measure subject to strict conditions in order to protect the rights of these two categories of persons. In the case of foreigners, the expulsion procedure is laid down in Decree No. 71-860 of 28 July 1971 adopted to give effect to the above-mentioned Act No. 71-10 of 25 January 1971 concerning conditions for the admission, residence and settlement of foreigners in Senegal. Basically, the expulsion of a foreigner is decided by an order of the Ministry of Interior. The grounds for expulsion may be reasons of national security or law and order. An expulsion order states the time-limit by which the foreigner has to leave the national territory. Until he is able to do so, he may be required by a decision of the Minister of the Interior to live where he is told to. An appeal may be lodged for the annulment of the expulsion order.

145. Refugees may be expelled from Senegalese territory for the same reasons as those given above. However, except for compelling reasons of national security, the expulsion may be ordered only in accordance with the ruling of a commission which is presided by a judge and before which the person concerned will be allowed to present his own defence. It should be noted that, as an observer, the representative of the Office of the United Nations High Commissioner for Refugees attends the meetings of the commission, which is also competent to grant or withdraw refugee status. All decisions by the commission, particularly expulsion orders, may be appealed on the grounds of abuse of authority (arts. 3, 4 and 5 of Act No. 68-27 of 24 July 1968).

146. In any event, the expulsion order must give the refugee concerned a reasonable period of time within which to seek admission to another country (art. 4, para. 2, of the Act). The same is true for a foreigner who has been expelled. He must be able either to return voluntarily to his country of origin or to seek admission to another country of his choice. It therefore follows that in no case can Senegal expel or return a person to a State "where there are substantial grounds for believing that he would be in danger of being subjected to torture".

147. The same concern is reflected in Act No. 71-77 of 28 December 1971 concerning extradition and in the extradition treaties which Senegal has concluded with other countries and whose pre-eminence is recognized in article 1 of the 1971 Act: "In the absence of treaties, the conditions, procedure and effects of extradition shall be determined by the provisions of the present Act". All of these texts expressly rule out extradition when, as stated in the 1971 Act, "The crime or offence is of a political nature or when it results from circumstances such that extradition is requested on political grounds". It is well known that a refusal to allow extradition which seems to have been requested on political grounds primarily reflects the concern to prevent a State from claiming that an ordinary offence has been committed in order to have a political offender turned over to it and to take reprisals against him.

Article 4

148. As indicated above, the Senegalese Penal Code does not contain any specific provisions on torture, as defined in article 1 of the Convention. Because of their general nature, however, many provisions of the Code may serve as a basis for the punishment of public officials and other Government agents who practise torture in the exercise of or in connection with their duties. The penalties for such offences are appropriate and take into account their grave nature.

149. Any acts in violation of freedom, civil rights or the Constitution, as provided for in article 106 of the Penal Code, are thus punishable by the penalty of the loss of civil rights, which is, under articles 6 and 8 of the Code, an infamous punishment. Senegalese law also punishes:

(a) Arbitrary detention and the refusal by prison warders to bring a prisoner before a magistrate. Arbitrary detention, which means the custody of a prisoner without a warrant or judgement or, in the case of expulsion or extradition, without a provisional order from the Government, is referred to in and punishable under article 111 of the Penal Code by imprisonment for six months to two years;

(b) A refusal or failure by any public official vested with police powers, whether administrative or judicial, to refer to the courts a claim for cognizance to be taken of illegal or arbitrary detention is referred to in and punishable under article 110 of the Penal Code by imprisonment for a term of five to ten years.

(c) Any judge or public official who holds an individual or causes him to be held other than at the places designated by the Government is liable under article 113 to the punishment of loss of civil rights. The lawmakers' severity is understandable because it is during this type of detention, which is supposed to be secret, that acts of torture might be committed.

(d) Holding in detention a person in respect of whom an arrest warrant or an order to compel attendance has been issued, who has not been interrogated within the period of time specified by law and who should therefore have been automatically released is tantamount to arbitrary detention and any judge or public official who ordered such detention may be liable to the penalties provided for in articles 110 and 111 of the Penal Code.

It should also be noted that victims of the offences referred to in articles 108 and 110 may be awarded damages which in no case may be less than 10,000 CFA francs (FF200) for each day of illegal and arbitrary detention (art. 108 of the Penal Code).

150. Moreover, articles 334 to 337 of the Penal Code provide for and punish illegal arrests and abductions committed by individuals. These provisions are extremely severe both for persons who carry out such arrests and abductions and for those who provide a place for the detention or the abduction. The penalties range from hard labour for 10 to 20 years (art. 334 of the Penal Code) to hard labour for life (arts. 335 to 337). However, the penalty is the death sentence if the person arrested, detained or abducted was subjected to physical torture (art. 337).

151. There is no doubt that the same penalties would apply to illegal arrests and abductions carried out by public officials, if such arrests and abductions took place under the circumstances described in the above-mentioned articles 334 to 337. Like individuals, public officials would be liable to the death penalty if the person arrested, detained or abducted had been subjected to torture. An attempted crime is always punishable because, under article 2 of the Penal Code, it is regarded as being the same as the crime itself. Accessories are liable to the same penalty as the perpetrators of such crimes (art. 45 of the Penal Code).

152. It is thus clear that, although Senegal intends to comply with the recommendations contained in article 4, paragraph 1, of the Convention, its legislation has adequate provisions to punish acts of torture committed by, or at the instigation of, public officials or other government agents pending the inclusion in the draft revision of the Penal Code now in preparation of a categorization specifically relating to torture.

Article 5

Paragraph 1

153. The above-mentioned principle of the territoriality of criminal law means that Senegalese criminal law and criminal courts have jurisdiction over offences committed in Senegal, regardless of the nationality of the perpetrators or the victims. Such jurisdiction extends to offences committed on board aircraft or ships flying the Senegalese flag. Thus, by law, any act of torture committed in Senegalese territory is, like any other offence, within the jurisdiction of the Senegalese courts.

154. Under article 664, paragraph 1, of the Code of Criminal Procedure (see para. 89 above), "Any Senegalese citizen who, outside the territory of the Republic, is guilty of committing an act characterized as a crime by Senegalese law may be prosecuted and tried by Senegalese courts". This means that a Senegalese national who allegedly committed an act of torture abroad may be brought before the Senegalese courts, for torture is a crime which, as stated above, is liable to the infamous punishment of loss of civil rights provided for in articles 6 and 8 of the Penal Code.

155. Article 5, paragraph 1, raises the question of the passive personality of criminal law which extends the legislative and judicial jurisdiction of a State to its subjects who are victims of offences committed abroad. The Convention will enable Senegal to incorporate this system into its legislation and thus establish its jurisdiction over the offences referred to in article 4 when the victim is a Senegalese national, if Senegal considers it appropriate.

Article 5, paragraph 2, article 6 and article 7

156. Since torture may be regarded as an international crime because it is prejudicial to the interests of the international community, article 5, paragraph 2, and articles 6 and 7 establish the principle of universal jurisdiction or, in other words, the universal competence of criminal law. These provisions relate to the extradition and trial of persons alleged to have committed acts of torture and, if they are not extradited, to their prosecution by any of the States Parties to the Convention.

157. When a State Party decides to establish its jurisdiction over the offences referred to under article 4, the alleged torturer must be given every guarantee of a fair trial (art. 6, para. 2, et seq.). The rights of the accused must be guaranteed at all stages of the proceedings (art. 7, para. 3). Senegal is a party to the Convention and has undertaken to respect all the recommendations contained in the articles relating to the case where persons being prosecuted for acts of torture or persons alleged to have committed such acts are present or discovered in its territory.

Article 8

158. Senegal has ratified the Convention against Torture and intends to comply with the recommendations contained in article 8. It thus undertakes to include acts of torture, which are offences under its Penal Code, in any extradition treaty it concludes in future with any other State Party to the Convention. It should be noted, however, that Senegal does not make extradition conditional on the existence of a treaty. Act No. 71-77 of 28 December 1971 on extradition is the ordinary law on extradition applicable to relations between Senegal and States with which it has not concluded an extradition treaty. It is, moreover, a set of residual rules which apply to any points not covered by extradition treaties.

159. With regard to offences which may be extraditable, the 1971 Act allows extradition for any offences liable to criminal penalties under the law of the requesting State and for any acts punishable by prison terms under the law of the requesting State, when the maximum penalty under that law is at least two years. Furthermore, these acts must also be punishable by Senegalese law. Since acts of torture are always liable to criminal penalties under Senegalese criminal legislation, the 1971 Act alone should make it possible to authorize a request for the extradition of the alleged perpetrator of an act of torture by a State Party to the Convention unless Senegal decides to submit the case to its competent authorities for the purpose of prosecution in accordance with article 7, paragraph 2, of the Convention.

Article 9

160. As a State subject to the rule of law, Senegal has concluded legal co-operation conventions with many countries, especially France, as well as in the context of inter-African legal co-operation. As a State Party to the Convention, it will therefore have no difficulty in complying with the recommendations contained in article 9 concerning criminal proceedings brought in respect of the offences referred to in article 4.

Article 10

161. In connection with the reforms being carried out at the National Judicial Training School, human rights teaching for trainee judges will be given in the Judicial Division. The same courses are to be given at the Police Academy for police and prison officials, at the Gendarmerie Training School and at the Customs Officials' School. These schools thus train personnel who may be involved in the custody or interrogation of any individual subjected to any form of arrest, detention or imprisonment. In the past 20 years, moreover, increasingly larger numbers of apolitical organizations whose members are from

all socio-professional categories have been actively involved in the promotion and protection of human rights through newspaper articles, radio programmes in the national languages, public lectures, symposia, seminars and conferences.

Article 11

162. Part I of this report describes all the rules and regulations for the protection of fundamental human rights and, in particular, the rights of the accused in connection with:

(a) Interrogation during the first appearance before the examining magistrate;

(b) Interrogation following the issue of a warrant to compel attendance or an arrest warrant. This interrogation must take place within 24 or 48 hours, as the case may be. Otherwise, the person in respect of whom the warrant is issued must be released automatically if those holding him are not to be prosecuted for arbitrary arrest;

(c) Custody and the rights of persons under a custody order, as well as the obligation of the prosecutor to visit premises where persons are held in custody;

(d) The treatment of prisoners, whose dignity must be respected, and the surveillance of prison establishments by prison and judicial authorities.

It has also been seen that police investigations, whether preliminary or in flagrante delicto cases, are usually conducted under the supervision of the Government Attorney at the Court of Appeal.

Article 12

163. Since Senegal is, as everyone knows, a State subject to the rule of law, any offence committed in its territory, including torture, gives rise to an impartial investigation. Such an investigation is conducted by police officers or gendarmes acting either on their own initiative or on the instructions of the State Prosecutor in the case of preliminary investigations (art. 67 of the Code of Criminal Procedure). In a flagrante delicto case, the criminal investigation officer goes promptly to the scene of the crime to make a report after having informed the State Prosecutor. Such inquiries may also be conducted by judicial authorities in connection with investigations by examining magistrates.

Article 13

164. In Senegal, any person who claims to have been the victim of a criminal offence has the right to complain either to the police or gendarmes, who must proceed to conduct an inquiry after having informed the State Prosecutor, or directly to the State Prosecutor, who will then proceed to conduct the inquiry. The person concerned may also bring his case before the examining magistrate by instituting civil proceedings, thereby avoiding the opposition or inertia of the Department of Public Prosecutions. He may also have the alleged offender summoned before the criminal court. In any such situation, his case will be examined impartially. The accused person, who is entitled to

exercise his right to a defence, will also be heard impartially. The inquiry will thus be conducted objectively, with full protection for the complainant and his witnesses, who cannot be subjected to any ill-treatment or intimidation "as a consequence of his complaint or any evidence given". In any event, the Senegalese Penal Code contains sufficient provisions for the punishment of such acts.

Article 14

165. Under article 145 of Act No. 65-51 of 19 July 1965 containing the Code of Obligations of the Administration, "an offence committed by a public official in the performance of his functions shall engage his personal responsibility if it is unrelated to the public service". When an action for compensation is brought in the circumstances referred to above, the Administration has to be involved. It is responsible for an offence committed by an official unless it brings an action against him. In other words, the victim of a deliberate personal wrongful act or inexcusable serious offence committed by a public official in the exercise of his functions or duties may bring an action for compensation against the Administration. To that end, he will have to implicate the government body to which the perpetrator of the personal offence belongs and which then has an obligation to compensate the injury suffered, if necessary, by bringing an action against the official responsible.

166. Since torture is defined in article 1 of the Convention as an act committed by a public official or other person acting in an official capacity, persons who are subjected to torture are therefore entitled to obtain compensation from the government body concerned in conformity with article 145 of the Code of Obligations of the Administration. In accordance with the general principles of responsibility, moreover, their dependants may claim compensation in the event of death. It may thus be said that Senegal's legal system guarantees the victim of an act of torture or his dependants, as the case may be, the right to fair and adequate compensation. It should also be noted that, in more general terms, any persons who have personally suffered loss or injury caused directly by an offence may obtain compensation by bringing a civil action either before the criminal court, in which case the civil action will be brought at the same time as the criminal action, to which it will be joined, or before the civil court.

Article 15

167. Although freedom of criminal evidence is the rule in Senegal, such freedom is limited by the application of certain general principles which prohibit using just any means to determine the truth. It is a requirement of Senegalese law that evidence must be collected according to proper procedures. The problem arises particularly with regard to the interrogation of accused persons and the hearing of persons who are suspects or who can supply information that may help to determine the truth. The interrogation must be conducted fairly and the use of any form of brutality (physical torture, excessively long interrogations, which are a kind of mental torture, beatings, etc.) by police officers or gendarmes to obtain confessions or any other statements is strictly prohibited, as is the use of scientific methods (hypnosis, narco-analysis). The result is that any statement which is established to have been obtained by torture cannot be invoked as evidence in the Senegalese criminal courts.

168. There have been cases where all or nearly all of the statements made during the preliminary investigation were declared invalid because it was proved that the alleged offenders had been subjected to ill-treatment during their interrogation.

169. In order to avoid possible abuses by the police or the gendarmes, the Code of Criminal Procedure provides that the State Prosecutor is entitled to order a person in custody to be given a medical examination and that that person is entitled to request such an examination if the prosecutor has not done so. In such a case, the State Prosecutor is required to order such an examination.

Article 16

170. What was stated with regard to article 15 of the Convention may also be applicable here. It is not only torture, the most barbarous of acts, that is prohibited in the practices of police officers, gendarmes or any other person acting in an official capacity in Senegal. We stated that there was also prohibition against the other forms of violence or ill-treatment that are inflicted on persons who are suspects or who can supply information that may help to ascertain the truth in order to force them to make statements. As in the case of torture, the use of such methods reflects deep-seated contempt for human dignity. Those are thus other forms of cruel, inhuman or degrading treatment that Senegal has always prohibited and punished and will continue to prohibit and punish in its territory. By way of example, article 166 of the Penal Code provides that: "Where an official or an officer, administrator, agent or servant of the Government or the police, a baliff or a commander in the security forces, without lawful reason, uses violence or causes it to be used against persons in the exercise of or in connection with his duties, he shall be punishable according to the nature and gravity of such acts of violence and article 178 below". Senegal will thus not fail to fulfil the obligations it has assumed in respect of this type of offence under articles 10, 11, 12 and 13 of the Convention.

Annexes */

I. Constitution of the Republic of Senegal

II. Convention on legal co-operation between the Government of the Republic of France and the Government of the Republic of Senegal

III. Act No. 73-47 of 4 December 1973 establishing a State Security Court to replace the Special Tribunal established by Act No. 61-57 of 21 September 1961

IV. Act No. 71-77 of 28 December 1971 on extradition

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*/ These documents are available for consultation in French, as they were received from the Government of Senegal, in the files of the United Nations Centre for Human Rights.

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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Initial reports of States parties due in 1988

Addendum

UKRAINIAN SOVIET SOCIALIST REPUBLIC

[17 January 1990]

I. General information

1. The Ukrainian SSR has consistently been in favour of eliminating the shameful practice of torture from people's lives and supports the United Nations efforts to get it completely banned everywhere. Ukrainian representatives played an active part in the drafting and adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the United Nations in 1984. The Convention was ratified by the Presidium of the Supreme Soviet of the Ukrainian SSR on 27 January 1987.

2. The basic legal principles which inevitably lead to the prohibition of torture and other cruel forms of treatment are contained in the Constitution (Fundamental Law) of the Ukrainian Soviet Socialist Republic. Thus, according to article 4, the Soviet State and all its bodies function on the basis of socialist law, ensure the maintenance of law and order and safeguard the interests of society and the rights and freedoms of citizens.

3. The Constitution also establishes that citizens of the Ukrainian SSR enjoy in full the social, economic, political and personal rights and freedoms proclaimed and guaranteed by the Constitution of the USSR, the Constitution of the Ukrainian SSR and by Soviet laws. The socialist system ensures enlargement of the rights and freedoms of citizens and continuous improvement of their living standards as social, economic and cultural development

programmes are fulfilled. Respect for the individual and protection of the rights and freedoms of citizens are the duty of all State bodies, public organizations and officials (Constitution of the Ukrainian SSR, arts. 37 and 55).

4. The Fundamental Law of the Republic establishes and guarantees the principle of the equality of citizens of the Ukrainian SSR before the law, without distinction of origin, social or property status, race or nationality, sex, education, language, attitude to religion, type and nature of occupation, domicile or other status (art. 32). Citizens of the Ukrainian SSR have the right to protection by the courts against encroachments on their honour and reputation, life and health, and personal freedom and property (Constitution, art. 55). They are guaranteed inviolability of the person, home, privacy of citizens and of their correspondence, telephone conversations and telegraphic communications (arts. 52, 53, 54).

5. An important guarantee of the rights of the individual is the provision in the Constitution that citizens have the right to lodge a complaint against the actions of officials, State bodies and public bodies. Complaints have to be examined according to the procedure and within the time-limit established by law. Actions by officials that contravene the law or exceed their powers, and infringe the rights of citizens, may be appealed against in a court in the manner prescribed by law.

6. Citizens of the Ukrainian SSR have the right to compensation for damage resulting from unlawful actions by State organizations and public organizations or by officials in the performance of their duties (Constitution of the Ukrainian SSR, art. 56).

7. In the Ukrainian SSR justice is administered only by the courts. The hearing of cases in all courts is collegial. Judges and people's assessors are independent and subject only to the law. A defendant in a criminal action is guaranteed the right to legal assistance. No one may be adjudged guilty of a crime and subjected to punishment as a criminal except by the sentence of a court and in conformity with the law (Constitution of the Ukrainian SSR, arts. 149, 152, 153, 156, 158).

8. The constitutional guarantees cited above are highly important principles of the Republic's legislation and are embodied in its Criminal Code and Code of Criminal Procedure, the Act on the Judicial System in the Ukrainian SSR and other legal instruments. On the basis of these constitutional provisions specific rules are formulated which lay down, for administrative and judicial organs and officials who are authorized to initiate criminal proceedings, to conduct inquiries, investigations and judicial proceedings relating to them and to supervise the execution of sentences by convicted persons, rules and procedures to ensure to the fullest possible extent that the truth of the matter is established, that the law is complied with and that any possibility of the use of torture or other cruel or degrading treatment or punishment is precluded. An account of these provisions is given below.

9. The Ukrainian SSR is not a party to any international agreement containing provisions of wider application than the provisions of the Convention against Torture. However, its criminal and criminal-procedure legislation contains provisions covering a wider range of acts that may be described as cruel, inhuman or degrading treatment.

10. There is nothing in the legislation of the Ukrainian SSR to prevent the provisions of the Convention being invoked before the courts or different judicial and administrative bodies. The provisions of the Convention may be applied in the Ukrainian SSR by implementing the provisions in its legislation which reflect the provisions of the Convention.

11. The Ukrainian Code of Criminal Procedure states that regardless of where a crime may have been committed, criminal proceedings relating to it shall be conducted in accordance with the Code of Criminal Procedure (Code, art. 3). The provisions of the Ukrainian Code of Criminal Procedure are applied in criminal proceedings relating to crimes committed by foreigners, except those enjoying diplomatic immunity. They also apply in the case of crimes committed by stateless persons.

12. The questions raised in the Convention concerning observance of the law in inquiries investigations, and judicial proceedings come within the competence of all the law-enforcement organs: the procurator's office, the Ministry of Internal Affairs and the courts. Cases involving breaches of discipline are dealt with by the appropriate authorities in the service concerned.

13. Persons who have received unlawful treatment during investigation and inquiry may, under articles 110, 234 and 235 of the Code of Criminal Procedure of the Ukrainian SSR, lodge a complaint with the procurator, who is required to examine it within three days and inform the complainant of his decision.

14. Should there be indications in an official's actions of a criminal offence, the procurator will initiate criminal proceedings or refer the matter to an investigator, and if it is established that an illegal act has been committed, send the case for trial.

15. When there is evidence that acts have been committed that fall within the definition of torture, criminal proceedings are initiated by the appropriate bodies independently of any complaint from the victim.

16. It should be pointed out that the person subjected to cruel treatment may lodge an appeal against the actions and decisions of the procurator and court with a higher procurator or a higher court.

II. Information concerning articles 2-16 of Part I of the Convention

Article 2

17. As stated in section I above, on the basis of the provisions of the Constitution, specific rules which directly prohibit the use of cruel or degrading treatment or punishment are laid down in the criminal, criminal-procedure, corrective-labour and other branches of Soviet law.

18. Recently, the Ukrainian SSR has taken a number of effective legislative, administrative, judicial and other measures to eliminate unlawful conduct such as was permitted in the past, to stamp it right out in the present and to prevent it in the future.

19. Ukrainian legislation does not contain any clauses on the possibility of using torture in exceptional circumstances.

20. Similarly, an order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

21. Under article 36 of the Ukrainian Constitution, "the Ukrainian SSR grants the right of asylum to foreigners persecuted for defending the interests of the working people and the cause of peace, or for participation in the revolutionary and national liberation movement, or for progressive social and political, scientific or other creative activity". Accordingly, such persons may not be expelled, returned or extradited to any other State.

Article 4

22. The Ukrainian Code of Criminal Procedure (art. 22) prohibits the use of force, threats or other unlawful means to obtain statements from the accused and others involved in the case.

23. Thus, under the Code, unlawful means may not be used to obtain statements, not just from the accused, but also from a suspect, victim or witness, or to obtain an opinion from an expert.

24. Public officials and others who obtain statements by coercion may be prosecuted under articles 165, 166, 167, 175 and 180 of the Ukrainian Criminal Code, depending on the nature of their acts. Thus, under article 175 of the Ukrainian Criminal Code, any person carrying out an inquiry or preliminary investigation who uses unlawful means to coerce a person under interrogation into making statements is liable to deprivation of liberty for up to three years. If in committing the offence he uses force against the person under interrogation or seeks to humiliate him, he is liable to deprivation of liberty for from two to eight years.

25. Officials are also liable to prosecution for arresting or detaining someone or compelling him to attend court in the knowledge that those actions are unlawful, instituting criminal proceedings against a person known to be innocent and putting a person known to be mentally healthy in a psychiatric hospital.

26. Furthermore, under article 166 of the Ukrainian Criminal Code, a person who commits acts that are ultra vires is liable to prosecution. In the absence of any aggravating circumstances, the penalty is deprivation of liberty for up to three years. If accompanied by the use of force or of a weapon or by actions that harass or degrade the victim, the offence is punished by deprivation of liberty for from two to eight years.

27. Under article 19 of the Ukrainian Criminal Code, persons who are indirect participants or accomplices in such offences are also liable to prosecution.

Article 5

28. Under article 4 of the Ukrainian Criminal Code, all persons who commit crimes in the territory of the Ukrainian SSR are liable to prosecution under the laws in force in the Republic.

29. Under article 5 of the Ukrainian Criminal Code, citizens of the USSR who commit crimes outside the boundaries of the USSR are liable to prosecution under the law in force in the Republic if proceedings are brought against them or they are committed for trial in the territory of the Ukrainian SSR.

30. Stateless persons in the territory of the USSR who have committed offences outside its boundaries are similarly liable.

31. If the persons in question have been punished abroad for the offences committed, the court may either reduce the penalty imposed on them accordingly or waive it altogether.

32. Foreign citizens are liable under Soviet criminal law for offences committed outside the boundaries of the USSR in cases covered by international treaties.

33. There is no general principle in the existing Ukrainian legislation establishing the criminal jurisdiction of the Ukrainian SSR in cases in which an offence is committed abroad against the life, health, honour, dignity or other rights and legal interests of Soviet citizens (including the offences referred to in article 4 of the Convention).

Article 6

34. As already pointed out, irrespective of where an offence is committed, criminal proceedings in the territory of the Ukrainian SSR are conducted in accordance with the Ukrainian Code of Criminal Procedure.

35. Ukrainian procedural jurisdiction covers citizens of the USSR, foreign nationals (apart from persons enjoying diplomatic immunity) and stateless persons (Ukrainian Code of Criminal Procedure, arts. 1, 3).

36. The court, the procurator, the investigator and the body responsible for the inquiry are required, within the limits of their competence, to institute criminal proceedings whenever indications of an offence are discovered and to take all measures required by law to establish the occurrence of the offence, to identify the persons guilty of committing it and to ensure their punishment (Ukrainian Code of Criminal Procedure, art. 4). The investigation of offences covered by articles 165, 166, 167, 175 and 180 of the Ukrainian Criminal Code is carried out by the investigators of the procurator's office (Ukrainian Code of Criminal Procedure, arts. 111, 112). Accordingly, in their investigation they have the obligations laid down in article 4 of the Code of Criminal Procedure. These obligations include keeping the accused in custody with the approval of the procurator (Ukrainian Code of Criminal Procedure, arts. 148 and 155) or taking any other measures of preventive restriction to ensure that the person in question does not escape investigation and trial (Ukrainian Code of Criminal Procedure, arts. 148-154). On the basis of article 12 of the Statute on Preliminary Custody, persons in custody may be allowed by the administration of the place of custody to receive visits from relatives or other persons provided that the official or body handling the case gives permission.

Article 7

37. Articles 32 and 154 of the Ukrainian Constitution establish the equality of citizens before the courts and the law. Article 35 of the Constitution guarantees citizens of other countries and stateless persons the rights and

freedoms provided by law, including the right to apply to a court and other State bodies for the protection of their personal, property, family and other rights. Since the procedural jurisdiction of the Ukrainian SSR extends to such persons, the provisions of the Ukrainian Code of Criminal Procedure that specify the rights and duties of those involved in proceedings and guarantee fair treatment at all stages in the proceedings are fully applicable to them.

38. Persons serving any form of sentence have the obligations and enjoy the rights established by law for citizens of the Republic, with some limitations strictly regulated by laws and other instruments. The legal rights and interests of those serving sentences are protected by a whole range of safeguards of an economic, political and legal nature.

Article 8

39. The range of extraditable offences is determined by the punishment that the court may impose for their commission (under the law of both contracting parties). As a rule, this punishment is deprivation of liberty for a period of more than one year or a heavier sentence. The criminal penalties under articles 165, 166, 167, 175 and 180 of the Ukrainian Criminal Code show that the offences they cover are extraditable.

Article 9

40. Legal assistance is rendered to other States in criminal cases, including cases connected with the acts referred to in article 4 of the Convention, in accordance with the international agreements concluded.

Articles 10 and 11

41. Standards for the humane treatment of offenders are embodied in the criminal, criminal-procedure and corrective-labour legislation of the Ukrainian SSR. These and other instruments categorically forbid officials to carry out any of the acts mentioned in article 1 of the Convention. The observance of these rules is continuously monitored by the judicial authorities, the procurator's office and government departments.

42. One of the prerequisites for observance of the Convention in practice is the system for training law-enforcement, teaching and medical personnel concerned in the custody and interrogation of persons held under any form of arrest, detention or imprisonment or having dealings with such persons.

43. The curricula of schools of law and medicine that provide training for staff of law-enforcement bodies and of the medical and psychiatric establishments concerned include the subjects of observance of the law and rules for the treatment of persons involved in criminal proceedings.

Article 12

44. Implementation of the requirements set forth in this article is implicit in the fact that Ukrainian criminal-procedure legislation calls for the rapid and full investigation of offences and conviction of the guilty, in the duty of law-enforcement bodies to initiate criminal proceedings within the limits of their competence in every instance where they discover indications of an offence and to take all measures required by law to establish the occurrence

of the offence, identify the persons guilty of committing it and ensure their punishment and in the obligation laid upon those bodies to ensure a thorough, complete and objective investigation of the circumstances of the case.

45. The Supreme Court of the Ukrainian SSR takes all measures within its power to prevent the use of unlawful methods of inquiry and investigation.

46. To that end the courts have, in particular, been instructed that any statement by an accused person, victim, witness or other person involved in the case about the use of unlawful methods of investigation against him should be examined with all possible thoroughness and measures taken to prosecute the person guilty of such unlawful methods of investigation.

47. On 27 December 1985 the Ukrainian Supreme Court adopted a decision of the Plenum on judicial practice in cases involving action taken ultra vires, which clears up any doubtful aspects of the application of article 166 of the Ukrainian Criminal Code.

Article 13

48. On the basis of the requirements of article 56 of the Ukrainian Constitution, actions by officials that contravene the law or exceed their powers and infringe the rights of citizens may be appealed against in a court in the manner prescribed by law. Citizens of the Ukrainian SSR also have the right to compensation for damage resulting from unlawful actions by State organizations and public organizations, or by officials in the performance of their duties.

49. The specific ways in which citizens exercise their right to obtain protection from the courts are set forth in detail in Ukrainian legislative instruments, and in particular in the Code of Criminal Procedure.

50. On the basis of the provisions set forth in articles 95 and 96 of the Ukrainian Code of Criminal Procedure, a suspect, accused person, defendant, convicted person, victim, witness or any other citizen who considers that he is the victim of torture or other cruel, inhuman or degrading treatment or punishment is entitled to submit a written or oral application for the institution of proceedings to the procurator, investigator, inquiry organ or judge, either personally or through his lawyer.

51. In accordance with the requirements of article 97 of the Ukrainian Code of Criminal Procedure, once the persons in question have received such an application, they are required, within three days, to take one of the following decisions: to initiate criminal proceedings; to refuse to initiate criminal proceedings; to forward the application or a report to the appropriate authority. At the same time they are obliged to take all possible measures to prevent or stop the offence. Refusal to institute proceedings can be appealed against by the applicant to the appropriate procurator or higher court.

Article 14

52. The legal system of the Ukrainian SSR ensures implementation of this article of the Convention. Full compensation is provided for moral, material and other damage caused to the victims of torture and to citizens who have been illegally prosecuted or suffered from the illegal use of remand in

custody as a preventive measure or the legal imposition of administrative penalties in the form of arrest or corrective labour, irrespective of the guilt of officials of the organs of inquiry or preliminary investigation, the procurator's office or the court. Compensation for the above-mentioned forms of damage and full rehabilitation must especially be granted to citizens when the illegal acts were the result of criminal behaviour by officials coming under article 1 of the Convention.

53. Under article 53 of the Ukrainian Code of Criminal Procedure, "the inquiry organ, investigator, procurator and court are required ... to take the measures provided for by law to compensate a citizen for damage suffered by him as a result of illegal conviction, illegal prosecution or illegal remand in custody as a preventive measure".

54. In the event of the citizen's death in such circumstances, the right to compensation passes to his heirs.

Article 15

55. Under article 65 of the Ukrainian Code of Criminal Procedure, no factual material can have validity as evidence in criminal proceedings unless it was obtained lawfully, which is a most important guarantee of its reliability. It follows from this legal requirement that evidence obtained from accused or other persons through the use of force or other impermissible methods of investigation has no validity as evidence.

Article 16

56. Ukrainian legislation and its practical application are wholly designed to prevent other cruel, inhuman and degrading forms of treatment or punishment not covered by the definition of torture in article 1 of the Convention.

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Addendum

SPAIN

[19 March 1990]

GE.90-11945/1767B

PART I: GENERAL INFORMAITON

A. Spain: A State subject to the rule of law

1. Pursuant to the 1978 Spanish Constitution, Spain is a State subject to the rule of law. Accordingly, title I of the Constitution relates to fundamental rights and freedoms.

2. There are two constitutional provisions that should be emphasized in connection with the subject-matter under consideration. Article 15 states that "Every person has the right to life and physical and moral integrity and may under no circumstances be subjected to torture or to inhuman or degrading punishment or treatment".

3. The right to freedom and security is guaranteed by article 17 of the Constitution, which establishes a link between the two concepts, so that the protection of the right to freedom presupposes security of person, essentially in respect of the law. The crux of the matter is thus to define under what circumstances persons may lawfully be deprived of their freedom. Article 17 of the Constitution establishes a maximum time-limit of 72 hours for pre-trial detention, after which the detainee must be released or placed at the disposal of the judicial authorities. If the detention is unlawful, Organization Act No. 6/1984 governing the habeas corpus procedure allows the detainee to be immediately placed at the disposal of the judicial authorities, at his own request or at the request of his relatives, his legal representative, the Department of Public Prosecutions, the Parliamentary Commissioner or ex officio.

4. Every detainee must be informed promptly and "in a manner understandable to him" (art. 17, para. 3) of his rights and of the reasons for his arrest. He may also not make a statement unless a lawyer is present.

5. When an accused person is found guilty, article 25 of the Constitution provides that he may not be sentenced to forced labour. It also states that convicted persons continue to enjoy their fundamental rights, unless their judgement provides otherwise and explains why.

6. These constitutional provisions have led to more detained regulations which relate to the subject-matter under consideration and are contained in the organization acts to be discussed in part II of this report. It should be pointed out that, under article 53 of the Constitution, fundamental rights and freedoms may be regulated only by law, which, "in all cases must respect their basic content". This constitutional mandate to give effect to the fundamental rights of Spaniards by means of organization acts implies the intensification of the basic importance which the legal system attaches to such rights, since an organization act to be adopted by the Spanish Cortes has to meet more stringent requirements than those usually applicable to ordinary laws.

B. International instruments ratified by Spain

7. Within the framework of the United Nations, Spain is a party to the International Convenant on Civil and political Rights, which it ratified on 27 April 1977 and article 7 of which prohibits torture or cruel, inhuman

or degrading treatment or punishment. Spain is also a party to the Optional Protocol to the International Covenant on Civil and Political Rights and thus recognizes the competence of the Human Rights Committee to receive allegations of human rights violations.

8. On 21 October 1987, Spain ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

9. Within the European framework, Spain ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms on 4 October 1979. Article 3 of the Convention prohibits torture and cruel, inhuman or degrading treatment or punishment. Any individual who considers himself the victim of such practices may seek redress from the bodies established by the Convention (art. 19), on the grounds that this provision has been breached. Spain has recognized the right of individuals to submit complaints for consideration by the European Commission and the European Court of Human Rights, which may also ascertain to what extent Spain is complying with its international obligation in respect of torture.

10. On 2 March 1989, Spain ratified the European Convention on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment. This Convention establishes a preventive system based on inspections of places of detention without prior warning by independent international experts empowered to carry out any type of investigation relating to the circumstances of persons detained in such premises. The entry into force for Spain of the obligations contained in this Convention means that there are now provisions which, together with those already in force, constitute a far broader set of standards relating to torture than those contained in the United Nations Convention. Nevertheless, article 10, paragraph 2, of the Constitution stipulates that "Standards relating to fundamental rights and freedoms recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain". This constitutional provision gives the Spanish legal system a basis for a broad interpretation of international human rights standards.

C. Incorporation of international treaties into domestic law

11. Under article 96, paragraph 1, of the Constitution, "Once validly concluded international treaties have been officially published in Spain, they shall form part of the domestic legal order. Their provisions may be repealed, amended or suspended only in the manner provided for in the treaties themselves or in accordance with the general rules of international law". Consequently, there is no need for any measure to adapt or incorporate the provisions of the Convention into Spanish law, as they are self-executing in the true sense of the word. As to substance, the matter is decided by the ad hoc provisions contained in the treaty in question. Since the Convention was offically published in Spain when it was reproduced in the Boletín Oficial del Estado on 9 November 1987, its provisions may be invoked before the courts or the administrative authorities, which may apply them directly on account of their self-executing nature.

D. Jurisdiction

12. If a person claims to have been the victim of torture or ill-treatment, the judicial authority with jurisdiction in the matter is the examining magistrate of the place where the act occurred. The allegation would lead to ordinary criminal proceedings to be conducted by the magistrate in question.

13. Moreover, the Constitution provides for, and Organization Act No. 3/1981 of 6 April contains regulations on, the office of the Parliamentary Commissioner, who is responsible for protecting the fundamental rights and freedoms referred to in title I of the Constitution, for which purpose he is empowered to monitor Government activity, and to whom any natural or legal person with a legitimate interest may apply, without any restriction on grounds of nationality or legal status, in order to ask for assistance.

E. Redress

14. An appeal against the decision of the judge who initially heard a case involving torture may be lodged with the Provincial Court (the competent higher court). The case may eventually come before the Supreme Court if an appeal to vacate is lodged.

15. The Constituion also deals with appeals for amparo to the Constitutional Court, to which any natural or legal person with a legitimate interest may apply, as well as with appeals to the Parliamentary Commissioner and the Department of Public Prosecutions. Appeals for amparo are lodged on the grounds of a violation of fundamental rights and freedoms.

F. Enforcement

16. There are several precedents in Spanish case law for the punishment of cases of torture. Two such judgements are annexed hereto, one dated 10 May 1985 and the other 5 July 1985; they were handed down by the Supreme Court against two public officials who committed acts against detainees or prisoners which constitute the offences referred to in article 204 bis and articles 582, 583, paragraph 1, and 585 of the Penal Code. One of the judgements highlights the difference between the offences referred to in article 187, paragraph 5, and in article 204 bis paragraph 3, of the Penal Code and is based on the underlying motive for the conduct covered by the first of those articles, namely, the desire to apply a degree of severity beyond that necessary to maintain disciplinary punishment, whereas, in the case of the second article, the aim is to make the prisoner's situation worse.

17. The harshest criticism against legislation relating to torture in Spain was levelled by various sectors of society when the so-called anti-terrorist legislation introduced by Organization Act No. 9/1981 of 26 December 1981 was in force. The Act authorized periods of pre-trial detention of up to 10 days. It was abolished by Organization Act No. 3/1988 of 15 May 1988, which introduced provisions relating to armed groups into the Penal Code and provided for the same periods of detention as for any type of offence. It should also be noted that the Council of Europe has never dealt with any complaint of torture relating to Spain.

PART II: INFORMATION CONCERNING THE ARTICLES IN PART I OF THE CONVENTION

Article 2

18. The measures incorporated in Spanish legislation to prevent torture are both internal and international in nature.

19. At the internal level, the Criminal Prosecution Act indicates that police officials have to account for the steps they have taken to the judicial authority or the Department of Public Prosecutions within 24 hours and are bound to refrain in every case from using methods of investigation that are not authorized by the Act. A clear definition of and respect for the rights of the detainee are also crucial for the prevention of torture. In this connection, article 520 of the above-mentioned Act reaffirms the right of the detainee to be informed clearly and in a language which he understands of the reasons for his arrest, to have legal assistance either at his own request or appointed by the court, to have his lawyer present during any questioning or identity checks he may undergo and either to be released or to be placed at the disposal of the court within 72 hours. Article 520 adds that the detention and subsequent proceedings are to be conducted in the manner that least harms the person or reputation of the accused. Similarly, as soon as deprivation of liberty has occurred, the person concerned has the right to inform a relative or person of his choosing that he has been detained.

20. Owing to the experts' interest in the question, particular reference should be made to the right of every detainee to be examined by the forensic surgeon or his deputy at the start of his detention so that it might be possible to determine whether he has suffered ill-treatment or torture before he is subsequently transferred from the custody of the police to that of the judicial authority or released. To this end, on 11 June 1981, the Ministry of the Interior issued an order concerning medical assistance for detainees which stipulates the times at which this examination should be conducted in order to provide detainees with every possible safeguard.

21. As far as international standards are concerned, special reference should be made to the European Convention on the Protection of Detainees from Torture and from Cruel, Inhuman or Degraing Treatment or Punishment mentioned above. The Convention establishes a commission with broad powers for preventing ill-treatment and the practice of torture in the States parties to the Convention. The most important method available to the commission is the possibility of having some of its members carry out visits to States parties. The States parties are required to provide the commission with a list of all places where persons are either being detained for short periods or serving a prison sentence. On the basis of this information and once they are in the territory of the State party, the members of the mission may visit places of detention without prior notice and the States party is bound to provide the mission with every facility to carry out its task, including interviewing detainees alone to hear any complaints they might wish to make. The findings of these visits will be included in a report that has to be approved by the commission.

22. In cases where exceptional circumstances threaten Spain's constitutional order or territorial integrity, the Constitution provides for the possibility of temporarily suspending certain guarantees. Regulations governing this

constitutional provision are contained in Organization Act No. 4/1981 of 1 June 1981 relating to states of alert, emergency or siege. In the first situation, no constitutional guarantees are suspended. Suspension does take place in cases where a state of emergency or state of siege has been declared, either throughout or in part of the national territory. Obviously, the rights whose exercise may be temporarily suspended do not in any case include the prohibition against torture and inhuman or degrading treatment. Since the declaration of a state of emergency or state of siege gives the executive powers that are ordinarily not to be found in a State subject to the rule of law, it follows that the possibility of practising torture may be made easier in such situations. To take account of this possibility, article 3 of the above-mentioned Organization Act stipulates that actions and measures adopted by the Government authorities during states of emergency may be challenged in court in conformity with the provisions of the laws. Therefore, and despite the existence of exceptional circumstances, the declaration of a state of emergency or state of siege does not in any way mean disregard of the basic principle underlying a State subject to the rule of law, namely, responsibility of the Government for its acts. It should be pointed out that none of these states of emergency has been declared in Spain since the publication of the 1978 Constitution.

23. With regard to the question of orders from superior officers or public authorities as a justification of the practice of torture, article 5 (d) of Organization Act No. 2/1986 of 13 March 1986 relating to the security forces stipulates that: "In no case shall due obedience apply to orders that involve the performance of acts that obviously constitute offences or violate the Constitution or the laws". Article 21 of Organization Act No. 13/1985 of 9 December 1985 setting forth the Military Penal Code contains similar wording. In addition, article 3 of the Order of 30 September 1981 relating to the basic principles of conduct of the members of the State security forces stipulates that the members of these forces are not bound to carry out orders which have been issued according to the regulations and involve the performance of acts that they know or should know to be in obvious violation of the laws or to constitute offences.

Article 3

24. Article 4, paragraph 6, of Organization Act No. 4/1985 of 21 March 1985 relating to extradition stipulates that extradition will not be granted when the requesting State does not provide guarantees that the person whose extradition is being requested will not be subjected to punishment that harms his physical integrity or to inhuman or degrading treatment.

Article 4

25. In the Penal Code, acts of torture are regarded as offences involving malice and article 204 *bis* treats them as such by stipulating the penalty it does for each offence, to the maximum extent, following the amendment of the Penal Code by Organization Act No. 3/1989 of 21 June 1989; it also provides for the disqualification of any authorities and public officials who, for the purpose of obtaining a confession during the course of a police or judicial investigation, commit any of the offences referred to in title VIII, chapters 1 and 4 (homicide and assault, respectively), and title XII, chapter 6 (threats and coercion), of the Code.

26. If, with the same intent they commit acts which constitute assault or are characterized as lesser offences as a result of threats and coercion of a nature similar to those referred to in articles 582, 583, paragraph 1, and 585, the acts will be considered as an offence and the penalties of brief imprisonment and suspension will apply. The penalties of brief imprisonment and specific disqualification will also be applicable to authorities or officials who, during criminal proceedings or the investigation of an offence, subject the person being interrogated either to conditions or procedures which intimidate him or to violence. Authorities or officials who fail in their duty and allow others to commit such acts are liable to the same penalty.

27. In the event of criminal proceedings against police officials or members of the Civil Guard, the ordinary courts are competent to try offences committed by them in the performance of their duties (art. 8 of Organization Act No. 2/1986 of 13 May 1986). Article 5 of this Organization Act provides that the basic principles of conduct of members of the security forces include the prevention, in the exercise of their professional duties, of any improper, arbitrary or discriminatory practices involving physical or mental violence, safeguarding of the lives and physical integrity of the persons whom they are detaining or who are in their custody and respect for such persons' honour and dignity. Article 27, which governs the disciplinary system for officials of the national police force, stipulates that the following in particular will be regarded as very serious offences: any abuse of power and the inhuman, degrading, discriminatory or humiliating treatment of persons in their custody, the penalty being dismissal or suspension from their duties for three to six years.

Articles 5, 6 and 7

28. All the requirements laid down in these articles are provided for in Spanish legislation. The principle of territoriality is embodied in article 8 of the Civil Code, according to which all persons in Spanish territory are bound by the criminal, police and public security laws, and in article 23, paragraph 1, of the Judicial Organization Act, which states that Spanish courts are competent to try cases involving serious and lesser offences committed in Spanish territory or on board Spanish ships or aircraft, without prejudice to the provisions of the international treaties to which Spain is a party.

29. The principle of protection is also provided for in Spanish legislation. Article 23, paragraph 3, of the Judicial Organization Act specifies that Spanish courts have jurisdiction over acts committed by Spaniards or foreigners outside the national territory when such acts may be characterized under Spanish law as offences committed by Spanish public officials residing abroad in the performance of their duties.

30. Spanish legislation also includes the principle aut dedere aut punire. Thus, according to article 23, paragraph 2, of the Judicial Organization Act, Spanish courts try acts characterized by Spanish criminal laws as offences even when they have been committed outside the national territory, provided that those criminally responsible are Spaniards or foreigners who acquired Spanish nationality subsequent to the commission of the act in question.

31. Moreover, article 23, paragraph 4, of the Judicial Organization Act provides for the principle of community of interests by referring to various extraordinarily serious offences for which Spanish courts have jurisdiction, whether such offences have been committed by Spaniards or by foreigners outside the national territory. It should be pointed out that the last paragraph of this article includes among these offences, "any other offence which, according to international treaties or conventions, should be prosecuted in Spain". In accordance with what was stated above concerning the self-executing nature of the international treaties and conventions published in the Boletín Oficial del Estado, it may be inferred that this article of the Judicial Organization Act applies to the contents of the Convention under consideration, for which reason it may be regarded as a sufficient legal basis for Spanish courts to act according to its precepts.

32. Spain is a party to the 1963 Vienna Convention on Consular Relations. According to article 36 of the Convention, a detainee is entitled to communicate with the consular officials of the State of which he is a national.

33. With regard to article 7, paragraph 2, of the Convention, it should be noted that, in Spain, torture is considered a serious offence, as shown by article 204 bis of the Penal Code, which stipulates that an authority or public official who is found guilty of the offence of torture will be liable to the maximum extent of the penalty attaching to an offence having the same results. Throughout the proceedings, however, the authority or public official against whom charges are brought in connection with an offence of torture enjoys all the guarantees granted by the Constitution and Spanish procedural law in such cases. Article 14 of the Constitution thus provides for the equality of all Spaniards before the law. If a person being tried in proceedings of this kind considers that he has not been given the procedural guarantees to which he is entitled, he may file an application for amparo with the Constitutional Court and, if the Court rules in his favour, any of his rights that might have been violated will be restored. If he does not agree with the decision by this high court, he may appeal to the institutions provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms, by whose decisions Spain is bound.

Article 8

34. Article 2 of Organization Act No. 4/1985 of 21 March 1985 relating to extradition states that "Extradition may be granted for those acts for which Spanish laws and the laws of the requesting State provide for a penalty or security measure whose maximum extent is no less than one year of imprisonment or for a harsher penalty; or when the complaint involves a penalty or security measure of no less than four months of imprisonment for acts also covered by Spanish legislation". According to article 204 bis of the Penal Code, torture may be characterized as the offences of homicide, assault, threats or coercion. In the first two cases, the penalty is obviously longer than the duration mentioned. In the case of threats or coercion and depending on whether there are aggravating circumstances, the penalty may be longer than one year. In any case and as stated above, any authority or public official accused of committing such offences in the course of a police or judicial investigation for the purpose of obtaining a confession or testimony will be punishable to the maximum extent of the penalty attaching to the offence. Article 204 bis also provides for the possibility that ill-treatment does not result in injury. In this case, although the act in question is one that the

Penal Code characterizes as a lesser offence, article 204 bis characterizes it as an offence in the case where it is attributable to an authority or public official, and the applicable penalty may therefore be longer than one year.

35. In any event and as indicated throughout this report, the provisions of article 8 of the Convention are directly applicable by the Spanish courts with no need for any transposition.

Article 9

36. On 14 July 1982, Spain ratified the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, which embodies the requirements contained in the Convention against Torture. Spain is also bound by a large number of bilateral agreements in this field. Where no multilateral or bilateral treaty obligations exist, articles 276 et seq. of the Judicial Organization Act establish the principle of judicial reciprocity.

Articles 10 and 11

37. Questions relating to the protection and promotion of human rights and to the prohibition of torture in particular are covered in all training programmes for officials who deal as part of their work with persons subjected to detention or imprisonment. Such officials include national police officers, members of the Civil Guard, Prison Service officials and students at the Judicial Training School.

38. Article 5 of Organization Act No. 2/1986 of 13 May 1986 relating to the security forces prohibits the members of the security forces from using any improper, arbitrary or discriminatory practice involving physical or moral violence against persons whom they have detained or who are in their custody. Article 9 of the Order relating to the basic principles of conduct of the security forces lays down a similar prohibition. Article 6 of the General Prisons Act stipulates that no inmate is to be subjected to ill-treatment in word or deed. Solitary confinement for more than 14 days must be approved by the prisons supervision judge,, who in any case monitors all types of punishment in prison.

Article 12

39. Although there are no special provisions of this kind concerning torture in Spanish internal law, it should be pointed out that the Department of Public Prosecutions is required to institute criminal proceedings in the case of any public offence. The Spanish Constitution and the Judicial Organization Act state the general rule that the function of the Department of Public Prosecutions is to set the system of justice in motion to defend legality, citizens' rights and the public interest as protected by law, either automatically or at the request of the persons concerned. With regard to specific regulations, article 105 of the Criminal Prosecution Act provides that officials of the Department of Public Prosecutions are under an obligation to institute any criminal proceedings they may deem appropriate, whether or not there is a specific accusing party. This means that, in respect of criminal actions by the Department of Public Prosecutions, Spanish procedural law is governed by the principle of legality. Criminal proceedings thus have to be instituted on the basis of a suspicion that an offence has been committed and neither the Department of Public Prosecutions nor the court,

in the first case, or the competent authority, in the second case, may request dismissal as long as there is material evidence that an offence has been committed and the alleged offender has been identified.

Article 13

40. There are no specific regulations regarding this aspect of torture. In general terms, the Criminal Prosecution Act stipulates that "Criminal proceedings are public. All Spanish citizens may institute them in accordance with the provisions of the Act", whether or not they themselves have been victims of the offence. Criminal proceedings may also be brought by foreigners for offences committed against their person or property or the person or property of their representatives.

41. The Criminal Prosecution Act also governs the system for the filing of a complaint, although it does not require the complainant to become a party to the case. The filing of a complaint is not only a right, but a duty for any person who in any way or for any reason has information about the commission of a public offence. Once the complaint has been filed or the criminal proceedings instituted, "the judge or official who has received the complaint shall immediately proceed to verify the act in question or to have it verified".

42. In any event, once a complaint has been submitted by any individual, it should be borne in mind that, under Spanish law, "the criminal action that automatically gives rise to the proceedings is not extinguished if the person against whom the offence was committed decides to withdraw the complaint", so that in no case will any action aimed at intimidating the complainant cause the criminal proceedings to be closed because the complaint has been withdrawn. In addition, the Penal Code makes it an offence against the administration of justice punishable by a penalty of imprisonment of up to six years for anyone to use violence or intimidation to attempt to have a complainant or party, expert, interpreter or witness withdraw his complaint, drop the proceedings or refuse to testify or testify falsely and for anyone to carry out any act against the life, integrity, liberty, security or property of the above-mentioned persons as reprisals for their participation in legal proceedings, unless the act in question constitutes a more serious offence, in which case the corresponding penalty degree will apply to its maximum extent.

Article 14

43. The right to redress and compensation is governed by the Penal Code, article 19 of which provides that "anyone criminally responsible for a serious or lesser offence is also civilly responsible". Article 22 extends subsidiary responsibility to the State for acts committed by its officials. The right to redress is also extended to the victim's family by article 104 of the Penal Code, according to which "compensation for physical and moral damage includes not only any damage sustained by the victim, but also damage that might have been suffered, as a result of the offence, by his or her family or a third party". In accordance with the provisions of article 105 of the Penal Code, moreover, legal proceedings to obtain compensation may be instituted by the victim's relatives.

Article 15

44. Spanish legislation does not contain any specific provisions in this regard. This gap has been filled by the Constitutional Court in several of its decisions. Thus, in judgement No. 114/84 of 28 November 1984, the Court stated that, "Although there is no specific legal rule establishing the inadmissibility of evidence acquired unlawfully, it must be recognized that it derives from the priority position of fundamental rights in the legal system and their expressly inviolable status". Statements and confessions obtained under torture may therefore not be used as evidence or even included in any legal proceedings.

Article 16

45. Article 204 bis of the Penal Code not only specifically refers to "conditions or procedures that intimidate [a person] or subject [him] to violence", but also prescribes penalties for offences covered by articles 582 and 585, which refer to ill-treatment that does not result in injury and to threats and coercion, which Spanish law regards as less serious offences.

Annexes */

1. Organization Act No. 2/86 of 13 March 1986 - Security Forces.

2. Organization Act No. 3/1988 of 25 May 1988 - Reform of the Penal Code.

3. Articles of the Penal Code referred to in the report.

4. Organization Act No. 3/1989 of 21 June 1989 - updating of the Penal Code.

5. Judgements of the Constitutional Court.

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*/ These documents, as received in Spanish from the Government of Spain, are available for consultation in the files of the United Nations Centre for Human Rights.